

**FACTORS WHICH IMPACT ON THE CHOICE OF ALTERNATIVE DISPUTE
RESOLUTION IN THE CONSTRUCTION INDUSTRY**

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ABSTRACT

The stated aim of this thesis is an empirical investigation into the factors which impact on the development and choice of Alternative Dispute Resolution (ADR) as a dispute resolution procedure between contractor and sub/specialist contractor in the construction industry of England and Wales. The methodology selected to achieve this aim was the collection of both quantitative and qualitative data through a postal survey and in-depth follow-up interviews. A further study of legal advisors to the construction industry was undertaken to investigate their attitudes towards ADR and to assess the influence of legal advisors in the choice and use of ADR by contractors. The research provides evidence that contractors are considerably dissatisfied with the costs, speed and adversarial approach of both arbitration and litigation and that many of the advantages of ADR, which are promoted its proponents, are held as perceptions by contractors. These attitudes are resulting in contractors being significantly interested in using ADR. However, the research confirms that ADR is not used extensively and provides data to show its use is hindered by negative perceptions, first, that it can be used to create delay in the settlement of disputes and, second, its non-binding nature is a weakness. The research indicates that contractors are likely to confine the use of ADR to small financial disputes and that arbitration and litigation are likely to continue to be preferred for large disputes. The development of ADR is likely to be further restricted by contractors' perceptions about the limitations of ADR for construction disputes. Contractors do not perceive ADR to be appropriate for disputes where the parties have become adversarial and entrenched in their position nor where the dispute is perceived to be legally or technically complex. These perceptions about ADR are supported by data from the interviews with legal advisors. Further, contractors' perceptions that the formal systems are manipulated in the dispute resolution process are confirmed. Legal advisors perceive that contractors generally adopt an adversarial approach by the time they seek legal advice and ADR is unlikely to be recommended or used in these circumstances. Non-binding ADR is unlikely to develop significantly as a dispute resolution procedure for main contractor and sub/specialist contractor disputes when the parties employ an adversarial approach or when the dispute is legally or technically complex. The research provides statistical and qualitative data about the factors involved in the choice of ADR by contractors and an analysis of its implications for the future development of ADR.

CHAPTER 1

1 Introduction.

The purpose of this chapter is to provide a synopsis of the research and the rationale for the aim, objectives and hypotheses of the research. The phenomenon that this thesis is investigating is the development of Alternative Dispute Resolution (ADR) in the United Kingdom (UK) construction industry. By ADR, is meant any process which is alternative to the formal procedures of dispute resolution. ADR is a generic term covering a collection of disparate procedures, which range from conciliatory processes such as mediation and conciliation to more formalised procedures such as the Executive Tribunal (called the mini-trial in the United States (US)).¹

In order to discuss ADR, it is necessary to define to what it is alternative. For the purpose of this thesis, these are considered to be litigation and arbitration.² Arbitration is often described as one of the ADR processes used by the US construction industry³ and there has been a debate in the literature as to whether it is an alternative dispute resolution process in the UK.⁴ However, it is included here as a formal procedure for four reasons:

¹ See appendix 1, the questionnaires used in the postal survey contain a brief definition of the procedures which are commonly referred to in the construction literature. See also Bevan A. (1992) Alternative Dispute Resolution. Sweet and Maxwell: London, for a comprehensive description of different ADR procedures currently referred to in the UK.

² Litigation is the formal procedure that the common law uses to resolve disputes. Arbitration was originally developed as an alternative to litigation but is now supported and governed by statute. Chapter 2 will explain more fully the reasoning behind the decision to include arbitration as a formal procedure. See Chapter 2 paras. 1-3

³ Sweet J. (1993) Some Reflections on ADR Lecture given at the Society of Construction Law Manchester June 10
Riggs L.S. and Schenk R.M. (1990) Arbitration: Survey on User Satisfaction, Journal of Performance of Constructed Facilities Vol 4 No 2.

⁴ Lavers A. (1992) Construction Conflict: Management and Resolution - Analysis and Solutions. Proceedings of the First International Construction and Management Conference. UMIST

First, both processes of adjudication are under a defined jurisdiction, with formal rules of procedure and governed by substantive law.⁵ Second, both are essentially adversarial and involve an elaborate procedural format.⁶ Third, the analysis of the development of arbitration shows that it has become increasingly formalised and legalised.⁷ Finally, the UK construction industry has employed arbitration since the last century and many of the standard contracts in the industry use arbitration clauses.

1.1 Background to the development of the thesis.

From the 1970s ADR was commented on in the US literature and it began to receive attention from legal sources in the UK⁸ from the early 1980s. By the end of the 1980s and early 1990s, it was increasingly referred to in the construction industry literature.⁹ Eventually this development extended to a proliferation of articles, which promoted the

Street L. (1992) The Language of ADR - Its Utility in Resolving International Commercial Dispute -The Role of the Mediator Arbitration May

⁵ See chapter 2 paras. 1-1.1

⁶ It is noted that the Arbitration Act 1996 has introduced measures which may create a move away from the adversarial approach. See chapter 2 para. 3.3

⁷ See chapter 2 paras. 2-2.3

⁸ Some examples:

Brown H. (1989) Sizing Up ADR The Law Society Gazette Number 46 December 20

Carroll E. (1989) Are We Ready for ADR in Europe? International Financial Law Review, vol 8 Part 12

Douglas G. (1989) The Report of the Newcastle Conciliation Project Unit Anglo American Law Review.

Givarry E. (1987) Talk First - Avoid Action The Law Society Gazette Number 26 July 5

Williams. R. Editorial (1987) Should the State Provide ADR Services (1987) Civil Justice Quarterly Vol 8 October 3

⁹ Some examples:

Mackie K. (1992) ADR and Construction Disputes Proceedings of the First International Construction Management Conference. UMIST

Royce N. (1989) Conciliation in the Business Disputes: Has it a Future? Construction Law Journal

Fenn P. (1989) Alternative Dispute Resolution Construction Law 2(3)

Holland D. E. (1992) ADR in Construction Arbitration February

Dixon G. and Carrol E. (1990) Construction Claims ADR Estates Gazette March 24

advantages of the disparate procedures and indicated a growing awareness of ADR amongst various sectors of the construction industry.

One of the catalysts for focusing the thesis on the construction industry was the First International Construction Management Conference on Construction Management and Resolution, which was held in 1992, hereinafter called the UMIST Conference. The conference revealed that the UK construction industry was not the only industry to be manifesting conflict and experiencing a developing awareness of ADR¹⁰ and it advanced a number of ideas about conflict and dispute resolution.¹¹ The study of the experiences of other construction industries is of potential value in understanding the emerging phenomenon of ADR in the UK.

The conference revealed that the experience of conflict and its resolution is not identical for every country. Differences in cultures for some countries were identified as important factors in the infrequency of dispute and conflict resolution: For example, the Japanese industry was reported not to have a high incidence of dispute: *"high incidence of disputes and conflict does not feature- Japanese Culture fosters trustworthiness."*¹² Infrequent disputes were said to be the corollary of a difference in culture to the Western world: *"The Japanese cultural heritage of non-argument is probably a contributory factor in preventing potential conflict involving Japanese firms."*¹³ The Chinese culture¹⁴ of

¹⁰ Brooker P and Lavers A (1994) Perceptions of the Role of Alternative Dispute Resolution in the Settlement of Construction Dispute: Lessons for the UK from the US Experience. Proceedings of the DART (Dispute Avoidance and Resolution Task Force)

¹¹ Latham A. (1992) op cit

¹² Fellows R. (1992) Karming Conflict Proceedings of the First International Construction Management Conference UMIST
Pilling S. (1996) The Japanese Experience in the UK International Construction Law Review

¹³ Nicholson M.P. (1992) Peace Love and Harmony Proceeding of the First International Construction Management Conference UMIST

¹⁴ Low Sui Pheng (1996) The Influence of Chinese Philosophies on Mediation and Conciliation in the Far East February Arbitration

compromise was identified as one reason for reducing conflict in Hong Kong and Singapore,¹⁵ although it was reported that in recent years major conflict is escalating and that these countries are following the Western hemisphere and resolving their disputes using third party neutrals.¹⁶ Houghton suggests that one factor in this development is the arrival of large-scale contractors and consultants from Europe, North America and Australia in the Far Eastern construction industry.¹⁷ Other research has suggested that the experience of conflict is cyclical, *"ideas, including dispute resolution ideas, pass through... evolutionary phases."*^{18,19}

For the purpose of this thesis, it was decided to use, where applicable, an examination of the experience of ADR in the US for a number of reasons: First, the method of procurement is similar to the UK industry. Second, the professional organisation of the industry is comparable to the UK. Third, both countries have the common law systems with comparable systems of dispute resolution. Fourth, it was observed that both construction industries have similar perceptions of the problems with litigation, which have resulted in the appearance in their literature of the advantages of ADR. Finally, the literature of the US indicated that it was further along the experiential path with ADR.²⁰

¹⁵ Houghton A. (1992) ADR - A Far East Perspective Proceedings of the First International Construction Management Conference. UMIST

¹⁶ Robinson N, Lavers A. Tan G. and Chan R.(1996) Construction Law in Singapore and Malaysia Butterworths: Asia

¹⁷ Houghton A. (1992) op cit

¹⁸ Connors E. (1991) Remarks on the Current and Future Use of Alternative Dispute Resolution in the United States. Canada United States Law Journal Vol 17

¹⁹ Nader L. (1988) The ADR Explosion- The implications of Rhetoric in Legal Reform Windsor Yearbook of Access to Justice 8 Nader notes in her article that legal historians and anthropologist have recognised a cycle in the third world colonialism. The ideal of harmony replaced feuds and wars as a form of pacification. Following the development of the new notions of states, the third world often replaced the harmony ideology with an adversarial model. In contrast, she notes the Western world is moving in the opposite direction.

²⁰ Rahim M.A. (1992) Managing Conflict in Organisations Proceedings of the First International Construction Management Conference, UMIST. It was suggested that the level of discussion of ADR in the UK is about 20 years behind the US.

Therefore, it was believed that valuable data could be accumulated on dispute resolution by an appraisal of the US experience with ADR, which could assist the understanding of ADR in the UK construction industry.

2 THE RESEARCH

2.1 Aims of the research.

The early literature search and the knowledge gained from the UMIST conference signified a potential development of ADR within the construction industry. Further, it suggested that attitudes and perceptions were being formulated in the industry. It was theorised that these attitudes would influence the development and choice of ADR. This led to the formation of the aim of the thesis, which was to investigate the factors which impact on the development and choice of ADR as a dispute resolution procedure in the construction industry.²¹

2.2 Objectives of the research

Having identified the aim of the thesis, the following objectives were formulated to achieve it:

- I. To obtain evidence of the perceptions of the members of the construction industry which may influence the choice of ADR as a dispute resolution procedure.
- II. To investigate the factors influencing the choice of ADR as a dispute resolution procedure.
- III. To assess the potential contribution that ADR may have in the dispute resolution process.

²¹ The size of the construction industry and the diverse interests that are encompassed in it led to the need for the research to be focused on a more narrow area. The investigation was eventually restricted to the development of ADR between main contractors and sub/specialist contractors. For an explanation of the factors involved in this decision see chapter 3 paras. 5.2.1-5.2.3

2.3 Literature Review and Indicator Interviews.²²

The first part of the research was to undertake a thorough review of the literature and to conduct exploratory, in-depth interviews with representatives of the different professional institutions and representative bodies of the construction industry.²³ The main objectives of this initial approach were:

1. To provide an objective appraisal of the background to the phenomenon of ADR in the construction industry.
2. To provide insight into the perceptions and attitudes of dispute resolution.
3. To narrow the research to an area where disputes are perceived to be most prevalent.²⁴
4. To build up an "item pool"²⁵ of attitudes and opinions on dispute resolution which could be tested further in the field.
5. To develop the theory and hypotheses of the research.

The interviewees from the indicator exercise were of the opinion that the most prevalent area of dispute in the construction industry is the interface between main contractor and sub/specialists contractor.²⁶ Thus, the research was to focus on these sectors of the construction industry.

²² See chapter 3 paras. 3-4.1.4

²³ See chapter 3 para. 4.1.1

²⁴ Chapter 3 para. 4

²⁵ Oppenheim A. N. (1996) Questionnaire design, interviewing and attitude measurement Pinter Publisher: London.

²⁶ Chapter 3 para. 4.1.4

2.4 Development of the objectives and hypotheses

The literature search and the indicator interviews disclosed further that, juxtaposed with the advocated advantages of using ADR, there exists, within the construction industry, a substantial level of dissatisfaction with the formal systems of dispute resolution, namely litigation and arbitration.²⁷ Both these dispute resolution procedures are perceived to be expensive, slow and adversarial in nature. The indicator interviewees intimated that these formal procedures can be manipulated by the parties to the dispute and their legal advisors in order to create delay and expense and, thus force the financially weaker party into compliance. This led to the development of a further objective to the research:

4. To investigate the perceptions of contractors, sub/specialist contractors and the legal professions²⁸ towards the involvement of each other in the dispute resolution process.

The evidence of the indicator interviews and the literature led to the formulation of the first hypothesis of the thesis. **(1) The development of ADR, between main contractor and sub/specialist contractor, is due to dissatisfaction with the formal systems of dispute resolution.**

The literature disclosed another facet to the growing awareness of ADR. Not only were its advantages being extolled in the literature by the proponents of ADR,²⁹ but a debate had developed, involving the advocates and the opponents of the new procedures.³⁰ The major advantages of ADR in comparison to the formal systems, its proponents claim, is that it is voluntary, confidential, cheap and quick and has a high settlement rate.

²⁷ See chapter 2 for a detailed examination of the dissatisfaction with the formal systems of dispute resolution. Chapter 2 paras. 1- 3.3.3

²⁸ The legal professions were to include claims consultants as well as solicitors and barristers. The indicator interviewees had suggested that claims consultants are increasingly consulted in construction disputes, particularly by sub/specialist contractors.

²⁹ Chapter 2 para. 5-5.1

³⁰ Chapter 2 para. 6-6.3

(Frequently success rates of 80-90% are claimed by advocates of ADR.)³¹ Using ADR, they suggest, is more likely to preserve the business relationship and enable the parties to work together in the future. ADR promotes commercial settlements rather than legal settlements. The parties themselves are in control of the procedures, which, therefore, provide more satisfaction with the resulting settlement. Further, ADR is flexible and the parties to a dispute are able to fashion a procedure to suit the individual problem and their own requirements. Thus, if a specialist third party neutral is required to make a decision, this can be established using Expert Determination. If the parties only wish to have an opinion of a specialist, Early Neutral Evaluation can be used. An Executive Tribunal can be devised, to enable a panel of senior executives from both sides of the dispute to analyse the strengths and weaknesses of their organisations' arguments with the aid of a neutral advisor. Alternatively, if the parties do not want a third party decision, mediation or conciliation can be utilised. These procedures facilitate a negotiated settlement, which both parties are satisfied with, through the help of a neutral third party.

The opponents of ADR are not confined to the construction industry. As early as the 1970s in the United States, concern had been articulated that there are underlying motives in the development of ADR. These centred around the interest that capital and government were exhibiting in the new procedures and the perceived unfairness of some of the new procedures for the weaker party of the dispute, who may not have either the abilities or the resources to represent themselves in ADR adequately.³² This debate is examined in further detail in chapter 2.³³

Independent of the ideological and theoretical arguments, a more pragmatic debate on the relative merits of ADR was discovered in the literature of the construction industry.³⁴ Part of the discussion revolves around the limitation of ADR to specific disputes. Thus,

³¹ Chapter 2 para. 5.1. The promotional material from CEDR (Centre for Dispute Resolution) and ADR Europe both claim 80% or over settlement rates for mediation.

³² Fiss O. (1974) Against Settlement Yale Law Review vol 93

³³ Chapter 2 paras. 5.2-5.2.2

³⁴ Chapter 2 para. 6.3

in some quarters, it is suggested that ADR is better suited to disputes which are small in financial size.³⁵ Other personnel in the industry contend that ADR is unsuitable when a legal precedent or complex legal issue is in contention.³⁶ There are differences of opinion as to the suitability of ADR for multi-party disputes.³⁷ These attitudes and perceptions are likely to be factors influencing the choice of ADR by contractors and one objective of the research was to test the existence and extent of these attitudes in the contracting sector.

However, it was discerned that a further controversy existed between the proponents and the opponents of ADR, which has translated itself into the formulation of negative attitudes, which could be distinguished in the literature.³⁸ For some people in the construction industry, ADR is not perceived to be the 'panacea'³⁹ for all the ailments of the formal systems.⁴⁰ Negative attitudes are expressed about various characteristics of ADR: for example; there are concerns that if one of the parties proposes ADR or ADR is used, it indicates a weakness in their case. Using ADR, it is suggested, could reveal too much of the case and trial strategy to the opposition. Some opponents believe that ADR can be used to delay further the settlement of the dispute. This is realised by one party agreeing to use an ADR procedure, merely to gain more time before reaching a settlement. Further, some oppose ADR on the grounds that it is non-binding and this is a weakness of the procedures because it can be used by one party, again to create delay.

³⁵ This was the opinion of several of the interviewees in the indicator interviews.

³⁶ Eg. Construction Industry Council (January 1994) Dispute Resolution Published by the Construction Industry Council (CIC) (Report which identifies the disputes that arise in the construction industry and existing methods of resolution.)

³⁷ Totterdill B. W. (1991) Does the Construction Industry Need ADR: The Opinion of an Engineer Construction Law Journal Vol 7 no 3.
Naughton P. (1990) Alternative Forms of Dispute Resolution - Their Strengths and Weaknesses Construction Law Journal. Vol 6 no 3
Royce N. (1989) op cit

³⁸ Chapter 2 paras. 6-6.2

³⁹ O'Connor P. (1992) ADR: Panacea or Placebo Arbitration May

⁴⁰ See chapter 2 para. 6.2 for a more detailed explanation of the negative perceptions which were elicited in the literature.

This is achieved by agreeing to use ADR, then, either refusing to accept the decision or to reach a settlement, thus forcing the other party to continue with the formal procedures.

Research in the United States had recognised that negative attitudes existed in the US construction industry and a survey of legal professionals was undertaken by the ABA (American Bar Association) Forum for the construction industry to test the reality of these perceptions.⁴¹ In fact, the US survey denounced these attitudes as anecdotal and having little credence in the experience of the legal advisors to the US construction industry. Nevertheless, the literature search and the indicator interviews revealed that similar negative perceptions exist in the UK construction industry.

The literature search revealed little evidence to indicate that ADR is being used extensively in the UK industry and the indicator interviews disclosed that, despite the industry preparing for a potential onslaught in the usage of ADR, it is not the experience of the interviewees that it is being used frequently.⁴² Most of the professional bodies involved in the construction industry, are building up lists of qualified mediators but the interviewees advised that few referrals are being initiated.⁴³ Of the referrals made, little or no data are available as to the eventual outcome of the ADR procedures or even if they have, in fact, come to fruition. This lack of evidence and information may be due, in part, to the nature of ADR, in that it is private and confidential or it may be due to the perceptions that ADR is limited in its application. However, the interviewees suggested that other factors are at play.

⁴¹ Stipanowich T. and Henderson D. (1992) Mediation and Mini-Trials of Construction Disputes Proceedings of the First International Construction Management Conference UMIST.

⁴² Two of the indicator interviewees had trained as mediators but, at the time of the interviews, reported that they had completed few mediations. One interviewee had received referrals but none of these had come to completion.

⁴³ In a telephone interview (1994) with a representative of the RICS (Royal Institution of Chartered Surveyors), the interviewee acknowledged that, despite producing a list of trained mediators, they were not aware of any mediation having taken place at that time. However, several referrals had been made.

Some of these factors centred around the negative perceptions of ADR. It was surmised that these negative attitudes are influencing the choice of ADR by contractors, which results in its infrequent use. This led to the formulation of the second and third hypotheses of the thesis: **(2) Main contractors and sub/specialist contractors hold negative perceptions about ADR and (3) Negative perceptions are hindering the development and choice of ADR by main contractors and sub/specialist contractors.**

The literature and interviews indicated a further area of concern. This is the potential involvement of legal advisors in ADR.⁴⁴ The concern with lawyers is not confined to ADR. Criticism is evident about their role in the formal systems of dispute resolution. The Interim Report on Civil Justice, by Lord Chief Justice Woolf, was highly critical of the adversarial approach adopted by the legal professions, which are blamed for escalating costs and preventing access to justice for the parties.⁴⁵ The Departmental Advisory Committee (DAC) on Arbitration Law, was critical of the practices of legal advisors in arbitration, which is believed to have led arbitration to follow "*slavishly*"⁴⁶ the court procedures. Some interviewees in the indicator interviews alleged that the legal profession are colluding with their clients in the manipulation of litigation and arbitration. This chiefly involves using the formal systems to create a delay in the settlement of the dispute. This led to the development of further objectives of the research which were:

5. To investigate the perceptions of construction law advisors towards ADR.
6. To investigate the factors which influence the construction law advisors' recommendations of ADR as a dispute resolution process.

This concern about the involvement of the legal profession in the formal systems of

⁴⁴ Chapter 2 paras. 5.22 and 7

⁴⁵ Woolf (The Right Honourable The Lord Woolf, Master of the Rolls) (1995) Access to Justice: the Interim Report (Lord Chancellors Department)

⁴⁶ Department Advisory Committee (DAC) on Arbitration Law (1996) Report on the Arbitration Bill Chairman Rt Hon Justice Saville February.

dispute resolution has generated a high level of apprehension, from some sectors of the industry, about the future role of lawyers in ADR. The literature⁴⁷ and interviews furnished evidence that legal advisors are seeking a leading role in its development. Both of the legal professions have made reports on ADR.⁴⁸ The Centre for Dispute Resolution (CEDR), which was set up to develop ADR and train mediators is reported to have substantial support from the legal professions and solicitors firms.⁴⁹ Concern is expressed that legal advisors will manipulate the development of ADR in two ways: first, by not recommending it and thus, perpetuating the use of the formal systems and second, in monopolising ADR by becoming increasingly involved in the procedures, either as the ADR specialists or by participating in the procedures in a representative capacity. As one representative of a specialist contractors organisation declared (Federation of Associations of Specialist and Sub-contractors, FASS), *"it is disturbing to see a predominance of lawyers yet again, what is more likely to ensure failure of a scheme than that?"*⁵⁰

A study of the development of arbitration, reveals that one of the factors involved in the increasing use of an adversarial approach was the employment of the legal professions in the procedure.⁵¹ It is, therefore, suggested that if the parties use legal advisors in ADR there is a danger that the procedures will chart the same development as arbitration, that is increasing legalism and formalism. It is, therefore, necessary to investigate the opinion

⁴⁷ Roberts S. (1992) Mediation in the Lawyers Embrace Modern Law Review March Vol 55

Roberts S. (1993) ADR and Civil Justice: An Unresolved Relationship Modern Law Review Vol 56

Robertshaw P. and Segal J. (1993) Milking of ADR Civil Justice Quarterly Vol 12

⁴⁸ Beldon R. (1991) Report of the Committee on ADR General Council of the Bar (Reported in Arbitration August 1992)

Brown H. (1991) ADR: A Report Prepared by Henry Brown for the Courts and Legal Services Committee Law Society. Legal Practice Directorate. July

⁴⁹ Bingham T. (1990) No losers when commerce triumphs over litigation Building 14 December

⁵⁰ Davies R. (1992) Construction Conflict - The Specialist Contractor's View Proceedings of the First International Construction Management Conference, UMIST.

⁵¹ Chapter 2 para. 3.2.2

of contractors about the involvement of legal advisors in ADR.

It has been postulated that people only settle their disputes after considering the likely outcome if it proceeds to court - "Bargaining in the Shadow of the Law".⁵² Many people are unable to assess accurately the legal implications of their dispute without seeking legal advice. The lawyers' role is, therefore, predictive.⁵³ They use their expertise to assess the likely outcome of either going to court or to an arbitration. Thus, it is deemed to be likely that the parties to a construction dispute will confer with legal advisors on this outcome before using any ADR procedure and one objective of the research was to investigate when contractors use legal advisors and whether they would use their assistance in the ADR. Further, it was essential to investigate the perceptions and attitudes about ADR, which are held by legal advisors to the construction industry. This was to be achieved by a separate study of construction lawyers, which took the form of in-depth interviews with solicitors, barrister and claims consultants.

The apprehension, articulated in both the literature and the interviews, about the potential role of the legal profession in the future development of ADR and the theory that legal advisors are likely to be consulted before an ADR procedure is used, led to the development of the fourth hypothesis: **Legal advisors in the construction industry are influencing the development of ADR.**

Chapter 3 describes and explains the methodology, which was designed to attain the objectives and to test the hypotheses which are described above. The following chapter provides an in-depth analysis of the background to the thesis and the theoretical underpinning of the hypotheses.

⁵² Mnookin R. and Kornhauser L. (1979) Bargaining in the Shadow of the Law: The Case for Divorce 88 Yale Law Review

⁵³ This is one concept of the School of American Realists. See Riddall. J. G. (1991) Jurisprudence Butterworths: London and Harris J. W. (1980) Legal Philosophies Butterworths: London

CHAPTER 2

THE BACKGROUND OF ADR IN THE UK CONSTRUCTION INDUSTRY

The previous chapter identified litigation and arbitration as the formal procedures of dispute resolution. Civil litigation,¹ the formal legal process of such countries as England and the United States of America, has often been perceived to be inappropriate by some sectors of society for the resolution of their disputes and there have been intermittent experimentation with alternatives.² The fate of most of these alternatives has been to be assimilated into the formal systems. This has been the case with arbitration, which began its inception as an alternative to litigation but progressed to a formalised and legal procedure.³ The history and development of arbitration, therefore, provides a useful comparison to the background of the present development of ADR. It is particularly relevant to this research because one of the biggest sections of industry to use its services is the construction industry, with an estimated 30-35% of all arbitrations being connected with construction.⁴

The following sections of this chapter will therefore examine briefly early alternatives to the English Common Law and the formal system in the US and the development of arbitration into a formal system of dispute resolution. It will consider the dissatisfaction which has arisen, both in the construction industry and more widely, with regard to

¹ Holdsworth W. S. (1924 Reprint 1966) A History of the English Judicial System. Methuen and Sweet and Maxwell: London
Fuller L. (1972) Talks on American Law. Voice of America Forum Lectures.

² Holdsworth W. (1924 reprint 1966) *ibid*.
Auerbach J. (1983) Justice Without Law Oxford University Press

³ Lane W. (1986) The Role of the Legislature and the Courts in the Development of the Arbitration Process Arbitration August

⁴ Hoare D. J. et al. (1992) Consumer Reaction to Arbitration in the Construction Industry Arbitration November.
Flood J. and Caiger A. (1993) Lawyers and Arbitration: The Juridification of construction Disputes Modern Law Review May Vol 56 They cite as evidence the support the construction industry has for arbitration, the number of arbitral appointments made from the construction professionals and from the International Chamber of Commerce (ICC), one of the largest users are construction disputes.

litigation and arbitration which has paved the way for the development of ADR.

1 EARLY EXPERIMENTATION WITH ADR.

1.1 Dissatisfaction with the Adversarial approach.

Looking for alternatives to the formal system is not a new phenomenon within Common Law jurisdictions. The common law system uses litigation, whose origins are derived from the Anglo-Saxon times and which operates an adversarial approach, the basis of which is that the truth of the conflict is found by requiring the disputants to prove their arguments by testing their veracity through cross examination.⁵ Formalised court procedures were developed to test the claimants' arguments through a prescribed process, which is governed by complex rules of evidence. Jolowicz suggests that the *"bedrock of the adversarial system is the parties' right to put whatever evidence they wish before the court subject to the law of evidence"*.⁶ It is the law of evidence that produces the complex rules and procedures. Each side may produce witnesses and experts who present their case and can be examined, cross-examined and challenged by the opposing side. It is this system of examination which is regarded as confrontational and for many people, who are not experienced in the procedures, as threatening.⁷ It is contended that, *"Once an adversarial framework is in place, it supports competition and aggression to the exclusion of reciprocity and empathy."*⁸

The adversarial approach has been said to reflect English cultural values and the English character⁹, although it was also concluded:

⁵ Jacob J. (1985) Justice Between Man and Man. Towards a Code of Civil Procedure Current Legal Problems.

Fuller L. (1972) op cit

⁶ Jolowicz J. A. (1996) The Woolf Report and the Adversary System Civil Justice Quarterly Vol 15, July

⁷ Flood J. A. and Caiger A. (1993) op cit
Bingham T. (1992) Judgement Ways Building 20 November
Try H. (1988) A Builders Conception Arbitration February

⁸ Auerbach J (1983) op cit

⁹ Jacob J. (1985) op cit

*"...it is riddled with serious defects. It is a hit and miss system: it inevitably creates avoidable delays, increases work, introduces an element of sportsmanship or gamesmanship into the conduct of civil proceeding: it engenders incompetence; slackness and even irresponsibility among some lawyers; and it envelops the judicial process with the kind of mystique which alienates people and inhibits them resorting to the courts for the resolution or determination of their disputes."*¹⁰

1.2 Early Alternatives to the English Common Law.

England has a long history of legal pluralism, where disputes were decided in local courts, by government bodies and by arbitrators using different rules to the common law. Holdsworth¹¹ described the existence of the courts of the Law Merchant during the Middle Ages, which were outside the jurisdiction of the courts of common law and equity. These courts dispensed similar laws and codes throughout Europe to cater for the merchants, who were a distinct class of people. These commercial courts, or courts of "piepowder",¹² were held by the mayor and bailiffs of the city, but the judges were the merchants who attended the fair. The procedure was summary and involved a relaxation of the ordinary rules of procedure, which enabled the development of the commercial law.

By the seventeenth century, the Common Law courts had absorbed the jurisdiction of these courts. This appropriation may have been due to the jealousy of the common law; during the Middle Ages the Judges' fees were paid for by the litigants,¹³ or it may have been the consequence of the transformation to a centralised, national, legal system, which

¹⁰ Jacob J. (1985) *op cit*

¹¹ Holdsworth W. S. (1924 reprint 1966) *op cit*

¹² Holdsworth W.S. (1924 reprint 1966) *op cit* The courts name "piepowder", as Holdsworth notes, was not used, as some writers have believed, because justice was dispensed before the dust could settle from the feet of the litigants but because the courts were frequented by the chapmen with dusty feet.

¹³ Parris J. (1978) The Law and Practice of Arbitration Goodwin Ltd: London.
Donaldson Rt. Hons Lord Justice (1981) Arbitration in the Eighties Faculty of Building.

is believed to be the inevitable consequence of the "industrial revolution".¹⁴

1.3 Early alternatives to the formal system in the US.

Thus, from the earliest times, in English society, there was a perceived need for alternatives to the formal systems, where discrete classes of community looked for better methods of resolving their disputes. This experience was mirrored by the U.S experience. Auerbach¹⁵ documents a history of non-legal dispute settlement dating back to the Dutch settlers, the Quakers, the Mormons, the Mercantilists in the 1700s, to the later immigrants of the 19th and 20th century: the Scandinavian, Chinese and Jewish communities.

Auerbach notes, that what all these American non-legal processes had in common was a community with a collective vision: *"How to resolve conflict, inversely stated is how (or whether) to preserve community."*¹⁶ They withheld their disputes from lawyers and judges because litigation was perceived to be divisive, expensive, technical and formal. Auerbach suggests that industrialisation and the dislocation of the American society resulted in the law being asserted to protect the new social order. The US, therefore experienced an early history of alternatives similar to that of the UK.

2 Development of arbitration into a formal system of dispute resolution.

ADR is, then, not a new phenomenon in the legal history of English or American society but the eventual outcome of these alternatives demonstrates that the common law subsumed their jurisdiction. However, arbitration, the origins of which have been traced back to the influence of the Roman law,¹⁷ has endured and developed. The constraints of

¹⁴ Ferguson R.B. (1980) Adjudication of Commercial Dispute and the Legal System in Modern England British Journal of Law and Society Vol 7

Arthurs H. W. (1984) Special Courts, Special Law: Legal Pluralism in Nineteenth Century England "Law and Economy and Society." Edited by Rubin and Sugarman

¹⁵ Auerbach J. (1983) op cit

¹⁶ Auerbach J. (1983) op cit

¹⁷ Abrahams B. G. (1988) The Origins of Arbitration Arbitration November

this thesis make it impossible to examine every piece of legislation or judicial decision but the major milestones will be examined, in order to draw a comparison with the present progression of ADR.

2.1 Factors involved in the support of business for arbitration.

Ferguson identifies diverse factors involved in the early patronage that business people gave to arbitration.¹⁸ Legal procedures were perceived to be inappropriate for the settlement of business disputes. There was a preference for disputes to be heard by persons experienced in the business area using "*natural rather than legal procedures.*"¹⁹ Even then, the cost of litigation was an influential factor. The attraction of arbitration was that it was a cheaper and quicker alternative than litigation. Another incentive was that litigation of commercial disputes, in the mid-nineteenth century, was decided by a jury and the business world was cynical about the decisions reached by the new classes of society, who were represented following the Juries Act of 1870. Business people did not believe that they understood the evidence before them.

2.2 The Formal System's interest in arbitration.

Parker identifies three theories to explain the preoccupation shown by the courts and the legislature with arbitration:²⁰ First, jealousy, as the common law was determined to keep the resolution of disputes within its own jurisdiction. Second, there was an apprehension that a new system of law would develop that could challenge the common law. Finally, a price was extracted for the support given by the courts to arbitration. This attention from the formal system, eventually, allowed arbitration to thrive as an alternative, yet preserve the overriding authority of litigation.²¹ Arthur recognises a further reason that

¹⁸ Ferguson R. B. (1980) op cit

¹⁹ Arthurs H.W. (1984) op cit

²⁰ Parker LCJ (1959) History and Development of Commercial Arbitration Lionel Cohen Lecture. Hebrew University of Jerusalem.

²¹ See Appendix 6 An extensive study was made of arbitration, which culminated in a paper presented at the Ninth Annual Conference of ARCOM. (Association of Researchers in Construction Management.) Brooker P. (1993) Will ADR Follow the Direction of Arbitration into Legalism and Formalism? Proceedings of the Ninth

arbitration was allowed to develop: It was appropriated by a powerful lawyers' lobby, which controlled the review of arbitration through legislation and the common law and influenced the development of the format of the procedures and finally, the lawyers themselves became arbitrators.²²

2.3 Legislative and court involvement in arbitration.²³

The first statutory involvement in arbitration in 1698²⁴ was to force the parties to abide by arbitration decisions that had been made a Rule of Court. Under this Act, the formal system recognised arbitration and thus gave it an increased stature. Further statutory intervention expanded the powers of the arbitrator and the procedure, whilst reserving the supremacy of the common law and the courts. Thus, in 1833,²⁵ the parties to an arbitration agreement were not allowed to avoid the procedure and go to the court once a submission to arbitrate had been made a Rule of Court. In the same Act, the arbitrator and the tribunal were given increased powers to compel witnesses, examine them under oath and prosecute them for perjury. By the Common Law Procedure Act of 1854, further stature was given to arbitration, as the parties were not allowed to by-pass an arbitration agreement and go to the court but the formal system did not relinquish its right to judge, because under the system of "staying the proceedings" they were still "seised" of the matter.

Similarly, the courts' involvement was one of ensuring the dominance of the common

Annual Conference of the Association of Researchers in Construction Management. (ARCOM)

²² Arthurs H.W. (1984) *op cit*
See Chapter 2 para. 3.2.1 for the criticisms of the legal professionals in construction arbitration.

²³ Lane W. (1986) *op cit*, Abrahams B.G. (1988) *op cit*, Donaldson Rt. Hon (1981) *op cit*, Parris J. (1979) *op cit*.

²⁴ "An Act for determining differences by arbitration." 1698

²⁵ "An Act for the further Amendment of the Law, and the better Advancement of Justice." 1833

law by not allowing arbitration to oust its jurisdiction.²⁶ At first, the courts had only been interested in jurisdictional review²⁷ of the arbitration but they became increasingly interested in procedural review and natural justice. Finally, the courts began to overturn arbitration decisions for mistake of law.²⁸ The formal system was ensuring that a separate body of law was not allowed to develop to challenge its pre-eminence. This power of overview was reinforced by statutory intervention. Under the 1854 Act, the "Special Case Procedure" conferred on the arbitrator the power to set out the facts of the award and request the Court to resolve legal problems. A new "case stated" procedure, under the 1889 Arbitration Act, gave the Court power to review any question of law arising out of the reference. When the court was asked to adjudicate on whether the parties to arbitration could exclude this power the court reaction was resolute.²⁹ The judgments in Czarnikow v. Roth Schmidt and Company [1922] 2 K.B. 478 demonstrate decisively that the common law would not allow two systems of law to exist.

The result of this court decision was that the parties were able to prolong judgement, as a matter of tactics in order to avoid payment, by requesting the review of the courts,³⁰ a tactic often employed by the construction industry.³¹ This eventually led to England being perceived as losing out as a leader in international dispute resolution, and resulted in lost revenues to the national economy. As a consequence, the 1979 Arbitration Act abolished the case stated procedure.

What the early legislation and court involvement demonstrates is that arbitration was given an increasing legal status but it also provided for a symbiotic relationship with the

²⁶ Parker LCJ (1959) op cit

²⁷ Whether the arbitrator has acting within the submission.

²⁸ Parker LCJ (1959) op cit

²⁹ Donaldson Rt. Hon Lord Justice (1981) op cit

³⁰ Commercial Court Committee Report on Arbitration 1978.Cmnd 7284
Donaldson L.J. (1981) op cit

³¹ Donaldson L J (1981) op cit

formal system. It is this relationship that has moulded and created the present structure of arbitration. Neither Parliament nor the courts were prepared to give arbitration, or the arbitrators, the wide powers of the courts. The process was to be controlled and overseen by the formal system. However, whilst arbitration was receiving support from the formal system, its role in dispute resolution has fallen increasingly into disrepute. Various sectors of business, including construction, now perceive that arbitration costs too much, takes too long, has become procedurally complex and too adversarial. It is failing to provide a cheap, quick and appropriate alternative to litigation.³² One of the major criticisms of arbitration is the "slavish"³³ adherence to an adversarial approach and the development of complex procedures, which are perceived to be inappropriate for the resolution of business disputes. The 1996 Arbitration Act was enacted in response to criticisms of the procedure, which will be considered in below.³⁴

3 Dissatisfaction with the formal systems of dispute resolution.

3.1 The *"three headed hydra"*³⁵ of costs and delay and vexation in litigation.

Two images of the process of litigation³⁶ have been identified:³⁷ one which protects the rights of its citizens, contains conflict and prevents violence and the other which is *"threatening, inaccessible and exorbitant"*,³⁸ particularly for the weaker members of society. It is the latter image which is most prevalent in the construction literature, where the above described problems of arbitration are similarly ascribed to litigation.

³² This dissatisfaction is considered in more detail. See chapter 2 paras. 3.2-3.22. Some examples: Bingham T. (1992) op cit, Royce N. (1989) op cit, Miller F. (1992) Another blunder hits the statute book. New Law Journal vol 142 no 6572. Goddard N. (1991) Arbitration or Litigation? A Comparison Arbitration November.

³³ Departmental Advisory Committee (DAC) on Arbitration Law (1996) op cit (para. 151 of the report)

³⁴ Chapter 2 para. 3.3

³⁵ Jacobs J. (1985) op cit

³⁶ Jacobs J. (1985) op cit

³⁷ Auerbach J. (1983) op cit

³⁸ Auerbach J. (1983) op cit

The costs and delays of civil litigation have been a matter of comment for decades and civil justice reform has been addressed in sixty reports since 1851.³⁹ Costs are depicted by Bentham as, *"the grand instrument of mischief in English Practice"*,⁴⁰ which can prevent people from either bringing actions, defending themselves or, in some cases, continuing with their disputes. Delay results in *"denial or diminishing of peoples legal rights"*⁴¹ because the effect is that the better resourced litigant is able to utilise delay and costs to force a favourable settlement. The vexation experienced by the litigant is caused by procedural technicalities which obstruct justice.⁴²

The business community in the US has a long history of criticism of the court system: *"There are few things managers dread more than litigation. Even petty cases have a way of damaging relationships, tarnishing reputations and eating up enormous sums of money time and talent."*⁴³ It is dissatisfaction of this type which is believed to be one of the major factors influencing the current *"explosion"*⁴⁴ of ADR in the US. Analogous to the US experience,⁴⁵ the UK literature reveals that *"resort to law is reluctant, infrequent and deplored."*⁴⁶ and that pursuing court action is seen as exceptional and costly and not

³⁹ Lord Woolf (1995) op cit

⁴⁰ cited in Jacobs J. (1985) op cit Bentham J. The Introduction to the Principles of Morals and Legislation. (Burns and Hart editors) (1970)

⁴¹ Jacobs J. (1985) op cit

⁴² Jacobs J. (1985) op cit

⁴³ Allison J.R. (1990) Five Ways to Keep Disputes out of Court, Harvard Business Review. January-February.

⁴⁴ Nader L. (1988) op cit

⁴⁵ Zander M. (1988) A Matter of Justice. The Legal System in Ferment I.B. Tauris & Co Ltd.

Lord Woolf (1995) op cit Chapter 2, para.2.

Woolf (The Right Honourable The Lord Woolf, Master of the Rolls) (1996) Access to Justice: The Final Report to the Lord Chancellor on the Civil Justice System in England and Wales London HMSO

⁴⁶ Weir A. (1986) A Strike Against the Law Maryland Law Review 46

to be lightly undertaken.⁴⁷

3.1.1 The Woolf Report on Civil Justice.

The latest report on the civil justice system in England and Wales was published in July 1996.⁴⁸ Hereinafter called "The Woolf Report". The Woolf Report is highly critical of the present state of litigation, its cost, slowness and its frequent failure to dispense justice to the litigant. The problems of civil litigation were summarised in the overview to the report and consequently form the basis of the recommendations for improving the access to justice through litigation:

*"it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, the wealthy and the under-resourced litigant. It is too uncertain: the difficulties of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants."*⁴⁹

The Woolf Report noted that the costs of litigation are increased further because of a *"multi-million pound litigation support industry"*,⁵⁰ which has developed for expert witnesses in the present climate. This view is supported by research into the use of expert witness in construction litigation and arbitration,⁵¹ which concluded that their fees often represent a significant part of the final legal costs and the use of partisan witnesses can prevent the judge reaching a quick decision or reduce the chance of the parties reaching a settlement. Moreover, the survey found there was agreement from members of the judiciary, solicitors and barristers that differences between expert witnesses were a

⁴⁷ *ibid*

⁴⁸ Lord Woolf (1996) *op cit*

⁴⁹ Lord Woolf (1996) *op cit*

⁵⁰ Lord Woolf (1996) *op cit* Chapter 12 para.2 of the report.

⁵¹ Fenn P. Speck C. and O'Shea M. (1995) Witness of Opinion and the use of Court Experts in the United Kingdom. The Construction Lawyer Volume 15 Number 4 November

"significant factor" in the length of trials.

This general view of the inadequacies of civil litigation was substantiated in the UK construction literature⁵² and supported in the indicator interviews. The problems of cost and delay were summarised in 1992 by the chairman of the Construction Industry Council: *"You can't win if you go to court. The high legal costs are part of it. Litigation is long and repetitive. The legal system is abysmal and inefficient."*⁵³ A spokesperson for the British Property Federation (BPF) stated in the indicator interviews that he would never recommend litigation and arbitration was not much better. One JCT 63 contract, which his company had been involved in from 1976, was still being litigated at the time of the interview in 1994.

3.1.2 Adversarial approach and the involvement of the legal professions.

Lord Woolf, in his Interim Report on Civil Justice, fixes the blame for many of the current problems of litigation on an *"unrestrained adversarial system"*⁵⁴ and there is severe censure of the legal professions, who cause much of the delay and the costs by their adoption of an *"excessive(ly) combative environment"*, which is used to wear the opponent down. Further, because of the uncertainty of litigation, the parties are prevented from estimating what their final liability would be if they lose their case.

The problem of the costs of lawyers in dispute resolution is one that is intensely felt in construction. The indicator interviews revealed that legal costs for both litigation and arbitration are perceived to be excessive and many believe that the expense of the formal systems of dispute resolution is aggravated by the costs of lawyers. A survey of 60 of the "top contractors"⁵⁵ revealed that there is substantial hostility to the way law firms

⁵² Try H. (1988) op cit, Bingham T. (1992) op cit

⁵³ Dixon I. (1992) Building 7 February 1992 Cited in Newman P. (1993) ADR- A Viable Option to Arbitration or Litigation? Construction Law Vol 4 Issue 2 June/July

⁵⁴ Lord Woolf (1995) op cit para, I.4.1 of the report.

⁵⁵ Barrett N. (1996) Choice Remark New Civil Engineer 8 February NCE survey of the "top 60" contractors on their attitudes to lawyers and their advice.

operate, the speed with which they respond and their fees. Further concern was expressed about the lack of accountability about lawyers' charges and the quality of work they do.

3.1.3 Woolf proposals.

Tracking system, case management, procedural and evidential reforms.

As a result of the investigation of the existing state of litigation, the Woolf Report makes far-ranging proposals for procedural and evidential reform, which are aimed to combat the chief criticisms of litigation,⁵⁶ and will, it is claimed, produce a "*new landscape of civil procedure*."⁵⁷ In order to improve the speed of litigation, a tracking system is proposed where different cases, according to financial size are channelled into a three tier structure: small claims for disputes under £3,000, fast track for claims under £10,000 and multi-track.⁵⁸ It is recommended that judges, through case management, should remove the management of the case from the litigant and, thus dispose of cases quickly and justly, but in a cost effective manner. To prevent delay, all cases, regardless of type, should proceed to a fixed time-table and a fixed date of trial. To curb costs, it is proposed that there should be a mandatory duty on lawyers to explain their charges before litigation commences and that this should include the potential overall costs of the case.⁵⁹ The Woolf report suggests that the legal profession should encourage its members to litigate on fixed fees.⁶⁰

Although construction disputes are likely to be multi-track cases, it has been suggested that the proposals for fast-track, which include: fixed costs, a time scale of 20-30 weeks, limited discovery, no oral evidence and the court power to appoint a single expert, could increase the number of smaller claims for workmanship and design, which are not

⁵⁶ Lord Woolf (1996) op cit, chapter 13 para. 11 of the report.

⁵⁷ Lord Woolf (1996) op cit para. 9 of the report.

⁵⁸ Lord Woolf (1996) op cit, The basic reforms, para. 3 of the report.

⁵⁹ Lord Woolf (1996) op cit para. 28 of the report.

⁶⁰ Lord Woolf (1996) op cit chapter 7 para.7 of the report.

presently pursued.⁶¹

There are recommendations for procedural and evidential reforms, which are aimed to cut costs, reduce delay and curtail the adversarial environment. This is attained through proposals for limited disclosure⁶² and the court appointment of single expert witnesses.⁶³ To prevent the parties creating delay and unwarranted expenses, it is recommended that the court should intervene and impose sanctions where one party has conducted the litigation in an *"unreasonable or oppressive manner"*.⁶⁴ Delay is tackled further by recommendations for sanctions for failure to comply with rules, timetables and all directions orders, which should include an automatic sanction for non-compliance.⁶⁵

3.1.4 Criticism of the Woolf Proposals

There is considerable academic debate that the proposed reforms will not necessarily improve the delays and costs of litigation.⁶⁶ The criticisms centre around several issues. For example; A major criticism is that Lord Woolf failed to do adequate research and, therefore, there is no guarantee that the proposed reforms will work.⁶⁷ The adoption of case management as a process has been criticised because it is said to be alien to the

⁶¹ Reid T. (1996) The Woolf Report Construction Law Vol 7, issue 5, November.

⁶² Lord Woolf (1996) op cit, chapter 12 paras. 37-52 of the report.

⁶³ Lord Woolf (1996) op cit, chapter 13. A whole chapter is devoted to the issues of expert witnesses in the report.

⁶⁴ Lord Woolf (1996) op cit, chapter 6 para.4 of the report.

⁶⁵ Lord Woolf (1996) op cit, "Sanctions" of the report.

⁶⁶ Zander M. (1995)(a) Why Lord Woolf's Proposed Reforms of Civil Litigation Should be Rejected Reform of Civil Procedure Essays on "Access to Justice" Edited by Zuckerman A.A.S. and Cranston A. Clarendon Press: Oxford

⁶⁷ Dehn C. (1995) The Woolf Report: Against the Public Interest? "Essays on Access to Justice" Ed Zuckermann A.A.S. and Cranston C. Clarendon Press Oxford
Zander M. (1995) (b) Are there any clothes for the Emperor to wear? New Law Journal February 3
Zander M. (1995)(c) Objection to Woolf New Law Journal August 2
Zander M. (1995) (a) op cit

culture and practice of judges and, consequently, doubt is expressed at their ability to adopt this practice.⁶⁸ A major criticism is that there is no clear assurance that the reforms will be adequately resourced and many of the proposed reforms may lead to increased costs and waste of judicial resources.⁶⁹ It has been suggested that the rationale of the report is based on an incorrect premise: that *clients are concerned primarily with a cost effective system rather than fairness*. Commentators point to research into client perceptions about litigation, which reveal that one of their primary concerns is with the fairness of the process and there is less concern about the outcome, cost and delay.⁷⁰ This may be a correct assumption, however the construction literature and indicator interviews have provided evidence that there is profound consternation in the construction industry with the current costs and delays.⁷¹

Zuckermann alleges that the proposals for procedural reforms will be circumvented by the practices of lawyers and, therefore, the costs of litigation will not be curbed.⁷² He claims that many of the excessive costs of litigation are due not to current procedures, but because of the incentives that lawyer have to make litigation expensive. He uses the failure of previous civil justice reforms to show how lawyers have used *"forensic practices designed to increase profit"*.⁷³

⁶⁸ Zander M (1995)(a) op cit, Zander M (1995) (b), Scott I. R. (1995) Case-flow Management in the Trial Court Essays on "Access to Justice" ed Zuckermann A.A.S. and Cranston A. Clarendon Press: Oxford

⁶⁹ Greenslade D. (1996) Objections to Woolf New Law Journal September 6

⁷⁰ Tyler T. (1988) Client Perceptions of Litigation: What Counts Process? or Results? Trial July
Allan E. Lind et al (1989) The Perceptions of Justice: Tort Litigants' Views of Trial, Court Annexed Arbitration and Judicial Settlement Conferences (Rand Institute for Civil Justice) cited in Zander M. (1995) (a)

⁷¹ See chapter 2 para. 3-3.3.3

⁷² Zuckerman A.A.S. (1996) Lord Woolf's Access to Justice Modern Law Review Vol 59 no 6 November.

⁷³ ibid For example: (cited page 780) The practice of witness exchange, introduced in 1992 to increase efficiency in the decision of challenging the witness, has in the words of Lord Woolf (Interim report chapter 3 para 9) *"[w]itness statement, a sensible*

Finally, Jolowicz has voiced concern that the Woolf proposals, which are aimed at avoiding procedural injustice of delay and excessive costs, may create, instead, substantive injustice.⁷⁴ The radical proposals for limited discovery and expert witnesses appointed by the court, which were devised to control costs and delay, he suggests, may progress to an inquisitorial approach, where the judge searches for the truth.⁷⁵ The present adversarial approach allows for decisions to be made on the all the facts (governed by the rules of evidence)⁷⁶ that the parties wish to rely on but the danger of an inquisitorial approach is that less evidence is permitted, which in complex cases may result in injustice.

3.2 Dissatisfaction with arbitration.

3.2.1 Costs, Delay and Vexation of Arbitration.

The dissatisfaction with litigation is mirrored in the perceived problems with arbitration. A cursory examination of 'The Journal of the Institute of Arbitrators' (Arbitration), which was first published in 1915, reveals that there were grievances from this period about delays, costs and the involvement of the legal profession and many of the complaints originated from the construction industry. It is commonly believed that the rigid observance of court-like procedures leads to delays in time and adds to the costs. These perceptions are also prevalent in the construction industry literature. Sir Michael Latham observed in the interim report of the joint review of the construction industry, which was begun in 1993: *"There is a general dissatisfaction with arbitration as a method of dispute resolution. It is seen as expensive, slow and nearly always left until after the contract has been completed."*⁷⁷ For many in the construction industry,

innovation...have in a very short time begun to follow the sad route of pleadings, with the draftsman's skill often used to obscure the original words of the witness."

⁷⁴ Jolowicz J. A. (1996) op cit

⁷⁵ ibid

⁷⁶ See Chapter 1 para. 1 and chapter 2 para. 1.1

⁷⁷ Sir Michael Latham (1993) Trust and Money: Interim Report of the Joint Government/ Industry Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry. para 42 (2)

litigation and arbitration are virtually indistinguishable from each other, except that in arbitration the disputants have to pay not only for the hire of the courtroom but for the judge, which is not the case in litigation.⁷⁸

A survey of consumer reaction to arbitration in the construction industry summarised in its findings evidence that arbitration is not fulfilling its original objectives of being a quick, cheap and fair alternative to litigation.⁷⁹ 80% of those surveyed, who had experienced arbitration, said their future relationship was affected. There were reports of "*gamesmanship*" used to influence the resolution. Larger firms were putting financial pressure on smaller firms by drawing out the proceedings. Blackmail was alleged, in the form of no more invitations to tender, if claims were pursued.

One of the major dissatisfactions about the arbitration process is the perception that it has been abused by some participants in order to create delay. This is achieved in various ways: First, the process of agreeing on the arbitrator can be used to stall the proceedings. This is a strategy that main contractors in the construction industry have been alleged to use, by a representative of FASS (Federation of Associations of Specialists and Sub-contractors). The interviewee in the indicator interview reported the growing concerns of the specialists and other contractors, who are especially vexed with the manipulation of arbitration by main contractors. It was claimed that main contractors, with the aid of their lawyers, delay the appointment of the arbitrator and this, together with the complexity of the arbitration procedure, can result in the hold up of cash flow within the industry for 18 months to 2 years. Further, it was contended that specialist sub-contractors, who are concerned, primarily, with survival in the present economic climate, are forced to settle the dispute for 40-60% less than the value.

The second method of delaying arbitration is by making late objections, with the intention of delaying the final settlement. The DAC in its 1996 report on the new

⁷⁸ Bingham T. (1992) op cit, The costs of a 5 day arbitration and a 5 day court hearing were compared. Arbitration, it was estimated, cost £47,000 and litigation £44,000.

⁷⁹ Hoare D.J. et al (1992) op cit

Arbitration Bill noted these tactics⁸⁰ and the literature corroborates that such strategies are employed:

*"There have been far too many cases in the past of parties to the arbitration delaying objections, which they could have perfectly raised earlier.....they have delayed until such time as the award has been made, for purely tactical advantage and to gain time, putting off the evil day when they would have to pay what they owe."*⁸¹

Further criticism has been levied at the inability of arbitrators to control the arbitration process, the parties and their legal advisors. Commentators are highly critical of some arbitrators and the powers they had under the previous legislation:

*"Under previous legislation and practice, arbitrators were almost entirely in the hands of the parties, or more likely their legal advisors. There was little arbitrators could do to drive the proceedings forward and to enforce their orders and directions without the co-operation and agreement of the parties."*⁸²

This view was supported by many of the interviewees in the indicator interviews. Frequently, the arbitrator is perceived by the users of arbitration as dividing the decision between the parties and to split the costs. A leading construction lawyer explained the grievances felt by many clients, which leads to the belief that once the parties have experienced arbitration there is little incentive to try the process again:

"The corruption of arbitration has led to the position, where, in most arbitrations of any size, the arbitrator has generally no training for rigorous, major, complex disputes, which a judge can do and the judge has sanctions. The arbitration process has flaws that the aggrieved participant is not happy about. The process of selecting the arbitrator

⁸⁰ DAC (1996) op cit para. 297 of the report.

⁸¹ Rutherford M. and Sims J. (1996) Arbitration Act 1996: A Practical Guide. (1996) FT Law and Tax

⁸² *ibid*

is not sophisticated. Often the arbitrator doesn't have a proper view of the merits, Often he splits the costs and the decision perhaps 60/40. People who have experienced it are not likely to want to use it again."

3.2.2 Legal Involvement in Arbitration.

As witnessed in the discussion on the development of arbitration, the formal system gave its support when it was needed but it did extract a price for legitimacy, which was increasing court and legislative intervention, which inevitably, perhaps, led to the interest of the legal profession. Many of the problems of arbitration in the construction industry are perceived to be due to the involvement of lawyers, who are criticised for "*hi-jacking*"⁸³ the process and making it a "*mimic*"⁸⁴ of litigation, with confusing procedures, which results in dependence on legal professionals and excessive legal costs. As early as 1920, arbitrators decried the need for the parties to involve lawyers in the actual arbitration.⁸⁵ The arbitrator was trained in law and able to resolve the point without the need for legal representation. It was noted that this involvement increased from seeking solicitors' advice and representation to eventually bringing in barristers.

Flood and Caiger⁸⁶ associate the growth of lawyer involvement in construction arbitration with the development of the standard form of contract in the Construction Industry. They recognized that lawyers involved in this field have sought to "*juridify*" arbitration in order to protect their position and authority from the non-lawyer: the architects, surveyors and engineers who are also involved in the arbitration process. They conclude that lawyers are in a singular position: "*...because of their power over the discourse of legalism. They have the power of appropriation.*"⁸⁷

⁸³ Bingham T (1992) op cit

⁸⁴ O'Connor P. (1992) op cit

⁸⁵ Expensive Arbitration The Journal of the Institute of Arbitrators (1920) Vol 1 Number 4

⁸⁶ Flood J. and Caiger A. (1993) op cit

⁸⁷ *ibid*

It would be too simplistic to place all the blame at the feet of the legal profession. To some extent, both arbitration and the law have responded to the demands of the users. It was the users of arbitration who wished to force the recalcitrant party to keep to the arbitration agreement or to abide by the decision. Some blame has been attached to the weakness of the arbitrators who are frightened of applications for their removal for misconduct and, therefore, are not prepared to stray from a procedure which imitates litigation. This view was registered by the DAC (Departmental Advisory Committee), which was set up to steer through a new arbitration Bill.⁸⁸ Further, some of the problems experienced in arbitrations are attributed to the parties themselves, who manipulate arbitration for their own aims: As one indicator interviewee, who was an arbitrator, asserted: *"Arbitration is more and more a process that allows the parties to elaborate the problem as lawyers elaborate the dispute."*

The early warnings given by arbitrators on the role of lawyers in arbitration were not heeded for 70 years. In 1996, the DAC observed the bullying tactics of arbitration lawyers, who try to force non-legal advisors to take particular courses of action by, *"seeking to blind him with legal 'science'"*⁸⁹ to get their own way. The committee noted that there is a perception, held by some people, that failing to use court procedures will result in challenges for misconduct.⁹⁰ The aim of the Committee was to enforce legislation which would prevent such bullying and to *"explode the theory that an arbitration has to follow Court room procedures"*.⁹¹

3.3 1996 Arbitration Act.

The 1996 Arbitration Act was given Royal assent in June 1996 and took effect in January 1997. One of the main aims of the Act was to tackle some of the worst abuses of arbitration by giving the arbitrator the flexibility to adopt a suitable procedure which

⁸⁸ DAC (1996) op cit, para. 153 of the report

⁸⁹ DAC (1996) op cit, para. 153 of the report

⁹⁰ DAC report (1996) op cit, para. 153 of the report

⁹¹ DAC Report (1996) op cit, para. 153 of the report

ensures a fair, economic and expeditious resolution of dispute, subject to the agreement of the parties.⁹² It was the intention of the DAC,⁹³ that all the provisions of the 1996 Act should be read together with the principle which is enshrined in section 1(a); *"to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense."*

In order to achieve this aim, clause 33 (1)(b) was enacted, whereby the tribunal is required to *"adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."* To enable the tribunal to carry out this duty, clause 34 sets out a list of procedures which may be adopted and gives the tribunal the power to choose the best way to proceed *"untrammelled by technical or formalistic rules."*⁹⁴ The DAC envisages that the arbitrator will take a more *"pro-active role"*⁹⁵ and believes that the Act now provides the arbitrator with the power to proceed with an arbitration in the most efficient and appropriate way, which may even be by adopting an inquisitorial approach.⁹⁶ If the arbitrator fails or, refuses in this power, then he may find that s/he is removed for failing to conduct the proceedings properly.⁹⁷

Provisions have been enacted to tackle some of the worst features of the arbitration procedure. Thus, the Act spells out that there is no longer a requirement to abide by technical rules of evidence and procedure,⁹⁸ which have resulted in excessive costs and

⁹² Arbitration Act 1996 Section 1(b) provides: "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

⁹³ DAC (1996) op cit para. 18 of the report.

⁹⁴ DAC (1996) op cit para. 166 of the report.

⁹⁵ Saville M. (Sir) (1996) An introduction to the 1996 Arbitration Act Arbitration August

⁹⁶ Arbitration Act 1996 s 34(g)

⁹⁷ Arbitration Act 1996 clause 68 "serious irregularity".

⁹⁸ Arbitration Act 1996 clause 34 (f)

delay. In order to deter some of the delaying tactics used in arbitration, the parties are under a general, mandatory duty to, "*do all things necessary for the proper and expeditious conduct of the arbitral proceedings.*"⁹⁹ This includes complying, without delay, with any determination of the tribunal in procedural or evidential matters or any order or direction of the tribunal. Further, the parties are required, to obtain, without unnecessary delay, court decisions on preliminary questions of jurisdiction or law.¹⁰⁰ The Act provides sanctions for failure to comply with these duties¹⁰¹ by giving the arbitrator the power to strike out for want of prosecution.¹⁰² The Act has incorporated other provisions to prevent delay, such as giving the parties time limits for applications and appeals to court.¹⁰³

One tactic employed by main contractors is to intimidate the sub/specialist contractor by employing an expensive counsel which results in increased costs for the arbitration.¹⁰⁴ This stratagem has been addressed in the 1996 Act by the implementation of a new provision to limit the amount of recoverable costs before the arbitration commences:

"We consider such power, properly used, could prove to be extremely valuable as an aid to reducing unnecessary expenditure....This will have the added virtue of discouraging those who wish to use their financial muscle to intimidate their opponents into giving up through fear that by going on they might be subject to a costs order which they could not

⁹⁹ Arbitration Act 1996 clause 40

¹⁰⁰ Arbitration Act 1996 clause 40(2)(b)

¹⁰¹ Arbitration Act 1996 clause 41

¹⁰² The Arbitration Act 1996 enacted what had been the law under section 13A of the 1950 Act, which was inserted by section 102 of the Courts and Legal Services Act of 1990.

¹⁰³ Arbitration Act 1996 clause 70

¹⁰⁴ Rutherford M. and Sims J. (1996) op cit
Klein R. (1996) Making the arbitrator master in his own house Building December 3

sustain. ⁿ¹⁰⁵

New provisions are introduced to prevent the parties tactically delaying the arbitration by making objections regarding jurisdiction, improper conduct, failure to comply with the arbitration agreement and other irregularities of the tribunal or proceedings. If the parties fail to make a timely objection to such provisions existing in the arbitration agreement, or given by the arbitrator or the Act, they may not raise that objection later, unless they can show either that they did not know or could not with reasonable diligence have discovered the grounds for the objection.¹⁰⁶

One method of creating delay, which has been used by some participants in arbitration was to question the tribunal's jurisdiction of the dispute.¹⁰⁷ Now the Act provides that once an arbitral tribunal has ruled that it has substantive jurisdiction and the other party could have challenged the decision, if they have not done so in the time allowed by the arbitration agreement or the Act, they are now not allowed to question the jurisdiction at a later stage on any grounds which have already been subject to a ruling.¹⁰⁸ Some commentators on the Act have applauded this provision and believe that it will prevent the worst manipulation of the arbitral process: *"The whole substance of this section can be summed up in the phrase, 'Put up or shut up'. Such a provision has long been needed."*¹⁰⁹

3.3.1 Criticism of the Act from the construction industry.

There is approval from some sectors for the new Act, which is perceived to have taken a firm line on some of the major concerns that have been articulated about construction

¹⁰⁵ DAC (1996) op cit para. 272 of the report.

¹⁰⁶ Arbitration Act 1996 clause 73(1)(a)

¹⁰⁷ DAC report (1996) op cit para. 138 of the report. Marriot A. (1996) The New Arbitration Bill Arbitration May Rutherford M. and Sims J. (1996) op cit

¹⁰⁸ Arbitration Act 1996 clause 73(1)(b)

¹⁰⁹ Rutherford R. and Sims J. (1996) op cit

arbitration.¹¹⁰ However, some commentators are sceptical that the Act has done enough to persuade contractors to choose arbitration. There are doubts whether arbitrators have the ability to adopt such flexible approaches as the inquisitorial style.¹¹¹ The DAC believed that the grounds for removing an arbitrator for failing to conduct the proceedings properly¹¹² should be confined to the arbitrator frustrating the objectives of the Act, by using procedures which do not avoid unnecessary delay and expense.¹¹³ However, it is suggested the wide discretion given to arbitrators under section 34 will give opportunities for challenge, when it is interpreted in the light of section 33, particularly as the courts often give restrictive interpretations, which rely on "*nuances of language*".¹¹⁴ Thus, some commentators believe that the Act will not prevent some time-wasting appeals for disputes in the construction industry.

There is criticism that arbitration under the Act is still unable to deal with multi-party disputes, which are often a feature in the construction industry.¹¹⁵ There is a belief that, because the Act preserves the right of the parties to agree the procedures,¹¹⁶ some legal

¹¹⁰ Some eg: Rutherford A. and Sims J. (1996) *op cit*, Klein R. (1996) *op cit*, Savill M. (1996) *op cit*

¹¹¹ eg: Morris P. (1996) The New Arbitration Act will do nothing to make arbitration more attractive to contractors Building December 13
Priestly R. (1996) How changes to the Act will Affect Construction disputes Building December 13
Bingham T. (1996) Arbitration Act Building December 13

¹¹² Arbitration Act 1996 clause 24(1)(d)(i)

¹¹³ DAC Report (1996) *op cit*, para. 106 of the report.

¹¹⁴ Wallace I. D. (1997) First Impressions of the 1996 Arbitration Act The International Construction Law Review

¹¹⁵ Redmond J. (1996) The inability of arbitration to deal with multi-party disputes Building 13 December
Priestly R. (1996) *op cit*

¹¹⁶ Arbitration Act 1996 section 1(b)

advisors may insist on a court room style.¹¹⁷ Further, there is a perception that abandoning evidential constraints and the possible use of an inquisitorial approach may be unacceptable to some users of arbitration in the construction industry.¹¹⁸ Construction disputes, it is claimed, require rigorous evidential testing and by adopting flexible rules even more unwarranted claims and defences will result. Consequently, it has been suggested that this will lead to legal advisors recommending that their clients from the construction industry either do not enter into arbitration agreements or advise on the inclusion of clauses which adopt pre-set procedures for construction arbitrations.¹¹⁹ Thus, there is criticism that the Act may fail to prevent time-wasting expensive procedures and the continuing use of an adversarial approach.

4 RECENT PHENOMENON OF ADR.

4.1 Perception people are more litigious than in previous times.

The perceived problems of both arbitration and litigation, which have been described, led to a resurgence of interest in alternative procedures. This began in the US in 1970s and the 1980s. This interest has been linked not only to a dissatisfaction with the formal systems but also to the perception that people, particularly Americans, are more litigious than in previous times and that the formal system cannot supply the demand.¹²⁰ Several factors have been identified to explain this. Modern life has become more complex and has consequently led to an increase the potential disputes. The church, family and the neighbourhood's traditional role in informal dispute resolution has declined. Coinciding with these factors, Government is increasingly becoming involved with the lives of its citizens, which is resulting in more disputes between them.¹²¹

¹¹⁷ Wallace I.D. (1997) op cit
Critchlow J. (1996) Arbitration Act Building December 13

¹¹⁸ Wallace I. D. (1996) op cit

¹¹⁹ Wallace I. D. (1997) op cit

¹²⁰ Auerbach J. (1984) op cit

¹²¹ Auerbach J. (1984) op cit

However, some researchers have "*exploded the myth*",¹²² that people are becoming more litigious. Galanter claims that the litigation rate in Colonial America was four times higher in some places than the rate in the twentieth century.¹²³ Alshuler comments that the problem with litigation in the US is an inadequate supply of adjudication rather than the excessive litigiousness of its people:¹²⁴

*"Recent years have seen both an expansion of law and a diminishing opportunity to invoke it. Perhaps, in fact overly elaborate procedures have saved us from overly expensive law. At the same time these procedures have limited our access to justice."*¹²⁵

Similar research in the UK by Markesinis,¹²⁶ contends that there is little difference in overall litigation rates between England and the US. The lack of availability of litigation for the US and the UK is similar for both countries and is likely to be one factor leading to the search for alternatives.

4.1.1 Litigiousness of the US construction industry.

The perception of increased litigiousness has been advanced about the US and UK construction industries. The US industry over the last 50 years is perceived to have become excessively litigious, which has resulted in an adversarial culture. The climate of the industry was depicted in the Newsletter of the US Dispute Avoidance and Resolution Task Force (DART):

"During the past 50 years much of the United States construction environment has been

¹²² Alschuler A.W. (1988) Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases. Harvard Law Review.

¹²³ Galanter M. (1983) Reading the Landscape of Disputes U.C.L.A Law Review Vol 31:4

¹²⁴ Alschuler A.W. (1988) op cit

¹²⁵ Alshuler A.W. (1988) op cit

¹²⁶ Markesinis B.S. (1990) Litigation Mania in England, Germany and the USA The Cambridge Law Review. July Vol 49 Part 2

*degraded from one of a positive relationship between all members of the project team to a contest consumed in fault finding and defensiveness which results in litigation. The industry has become extremely adversarial and we are paying the price."*¹²⁷

There is a perception that, *"The construction industry suffers from chronic dispute problems."*¹²⁸ Added to this, it is well documented that there is dissatisfaction with litigation: *"businessmen and observers perceive that the courts are overcrowded, the cases are more and more complex, and the costs, both in monetary and organisational terms, have become excessive."*¹²⁹

Although for many in the US arbitration is perceived as a form of ADR, for others it is little different from a *"less structured form of litigation."*¹³⁰ An arbitration survey undertaken by the American Bar Association (ABA) made qualified observations of the advantages of arbitration over litigation and indicated that there is dissatisfaction with both dispute procedures in the US construction industry: *"While the ABA survey on construction arbitration makes clear that construction lawyers generally prefer arbitration to litigation before a judge or jury, it also demonstrates that in many cases arbitration does not provide efficient, economical and expert justice."*¹³¹

The adversarial attitude in the US construction industry and the dissatisfaction with litigation and arbitration has led to the search for alternatives, which, it is maintained, is unprecedented in the history of the US construction industry:

¹²⁷ Latham M. (1994) Constructing the Team HMSO ISBN 011299X London cited 9.1 quoting DART newsletter. February 1994

¹²⁸ Marcus G. and Marcus P (1987) Fact-based Mediation for the Construction Industry Arbitration Journal Vol 42 Part 2

¹²⁹ Gaede A. H. (1991) ADR - The US Experience and Some Suggestions for International Arbitration: The Observations of an American Lawyer International Construction Law Review

¹³⁰ Riggs L.S. and Schenk R.M. (1990) op cit

¹³¹ Stipanowich T. (1988) The ABA Construction Arbitration Survey Construction Law Journal vol 4 no 4

*"Never in history has so much effort been directed at improving procedures by which controversies are resolved. The quiet revolution affecting dispute resolution reflects widespread concerns with the limitation of formal adjudicatory systems and a renewed emphasis on negotiated settlement."*¹³²

4.1.2 Litigiousness of the UK construction industry.

A review of the UK literature discloses that, in the present time, the construction industry experience of dispute is comparable to that of the US industry. There is analogous criticism about its litigious nature and the frequency of disputes.¹³³ It has been estimated that between 1973-1980, there was a 100% increase in the number of cases brought before the Official Referees court (OR), which has jurisdiction over construction disputes, and that this increased by about 15% until 1989.¹³⁴

Research into the litigation practices of the industry has been undertaken by Fenn,¹³⁵ who investigated the number of cases tried in the OR court from 1880-1986. He concluded that the overall figures did not indicate an increasing level of construction litigation, however, there was a marked increase in the number of cases brought before the court, which were not tried as a result of settlement before the court date. He believes the figures support the perception that construction is contentious and disputes are on the increase. This earlier research has been supplemented by further investigation of the OR court, which suggests that there is an increase in the rate of litigation and that the court

¹³² Stipanowich T.J. and O'Neal L.K. (1995) Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution Part 1 The Construction Lawyer Vol 15 number 4.

¹³³ Latham M. (1993) Interim Report Trust and Money op cit

¹³⁴ Newey J. (His Honour Judge) (1992) The Construction Industry Proceedings of the First International Construction Conflict: Management and Dispute Resolution Conference. UMIST

¹³⁵ Fenn P. (1991) Managing corporate conflict and resolving disputes on construction projects. Proceedings Seventh Annual Conference of The Association of Researchers in Construction Management.

is under resourced for that level of litigation.¹³⁶

4.2 Government and Industry Review of the Construction Industry.

Latham Review.¹³⁷

The Interim Report of the Government and Industry Review identified and analysed the main issues and the problems that beset the construction industry in the 1990s. The report describes a culture of conflict and increasing litigiousness, where disputes are intensified by the adversarial approach, which is endemic in the construction industry.

*"It is widely acknowledged that the industry has deeply ingrained adversarial attitudes. Many believe that they have intensified in recent years. There is also general agreement that the route of seeking advice and action from lawyers is embarked upon too readily. While relatively small number of these legal disputes actually reach formal Court hearings, the culture of conflict seems to be imbedded, and the tendency towards litigiousness is growing. These disputes and conflicts have taken their toll on morale and team spirit. Defensive attitudes are commonplace. A new profession of "Claims Consultants" has arisen, whose duty is to advise some participants in the construction process how they should seek to make money out of the alleged mistakes or shortcomings of other participants. While clearly the existing culture of claims provides its own justification for such services, it is difficult to imagine a starker illustration of adversarial arrangements within the construction process itself."*¹³⁸

4.2.1 Manipulation of the formal systems of dispute resolution by the construction industry.

Added to this perception of the adversarial and litigious nature of the UK construction

¹³⁶ Fenn P. and Singh. N. (1993) Recent Trends in Litigation and UK construction projects. Proceedings of the Ninth Annual Conference of the Association of Researchers in Construction Management. ARCOM

¹³⁷ Latham M. (1993) Interim Report op cit

¹³⁸ Latham M. (1993) Interim Report op cit para. 8 of the report.

industry, a more serious allegation has been made in both the literature¹³⁹ and the indicator interviews. It is claimed that both arbitration and litigation are manipulated as levers for negotiation by the legal advisors and their clients. Due to the expense and time involved in both procedures, the threat of either can be tactically exploited.¹⁴⁰ Part of this process was the utilisation of arbitration and litigation by using the threat of either to indicate the seriousness of and commitment to the dispute. The tactics of this process were described by a construction solicitor in the indicator exercise:

"One factor that frequently arises amongst contractors is tactically issuing or facing a writ. So they recognise the tactics, which don't carry a sense of commitment to long running dispute. If they issue a writ, they are beginning a process where there will be high costs to get out. It is part of the contractors' culture. ADR has no alternative to this."

Specific problems for sub/specialist contractors were highlighted by the indicator interviewees. Often the costs and delay of the formal system, results in the sub/specialist being in a weaker position in relation to the main contractor who has superior financial resources. This may result in the failure of the claim:

"The sub-contractor says he has been underpaid. He is usually locked into an arbitration procedure and the main contractor tries to frighten him off with a counter claim at the same price or more. The sub-contractor has to decide whether to deal or back off. They may be against more commercial power."

These perceptions as to the litigious nature and adversarial culture of the construction industry have created a preoccupation with ADR which is evident in current literature¹⁴¹

¹³⁹ Some examples: O'Connor P. (1992) op cit, Construction Industry Council report (1994) op cit, Hoare et al (1992) op cit.

¹⁴⁰ Hoare et al (1992) op cit

¹⁴¹ Some examples: Dixon G. and Carrol E. op cit, Mackie K. (1992) op cit, Royce N. (1989) op cit, Collins J. (1992) ADR Mediation v Confrontation Estates Gazette March 21, Watson A. (1992) A Look at ADR. Litigation, Bevan A. (1992)

and was confirmed in the indicator interviews. The study of the history of the earlier alternatives to the formal system and the present climate of dissatisfaction with the formal systems led to the formulation of the first hypothesis: The development of ADR in the construction industry is due to dissatisfaction with the formal systems of dispute resolution.

4.2.2 Perceptions of the Major Causes of Dispute

A primary factor identified in the literature and the indicator interviews as causing dispute is competitive tendering in the present economic climate. The knock-on effect is that contractors, who cannot complete for the price tendered, are putting pressure on the sub/specialist contractors and exploiting them for extended credit. The RICS (Royal Institution of Chartered Surveyors) has a Quantity Surveyor's scale of fees for pricing. The legal representative for the Institution contended that they were aware of some bids which were 60% below the recommended scale. An arbitrator who was interviewed described the process of competitive tendering, which it is claimed is resulting in an increase in claims:

"With competitive tendering, they put in a price where there is no profit to be made and it is in their interests to create confusion and friction between the parties working together so they can get extensions of time and so get a profit. Big jobs have claims departments from the beginning."

This practice has left the industry in a volatile situation, where a *"claims culture"* exists.¹⁴² However, many claims are never pursued, due to businesses going bankrupt and into receivership. The recent recession of the construction industry is blamed for some of the conflict that is present. Interviewees suggested that in the past variations may have been absorbed, but now any variations have to be paid for and the effect is to make the parties keep to the strict letter of the law. It is perceived to be an inevitable consequence of competitiveness:

Alternative Dispute Resolution Sweet and Maxwell: London

¹⁴² Latham M. (1993) Interim Report op cit

"The recession has not helped to diminish claims but there is a possibility that there is not enough money to pursue them. They have to adjust the service and so only give the service offered. Now they have attention to the absolute letter of the contract. This has contributed to dispute."

It has been suggested that when there is an economic boom the commercial world perceives that the law is too rigid and is failing to respond to its needs and this results in experimentation with alternatives.¹⁴³ However, when it is in decline, people are more likely to stand on their legal rights, as they have more to lose.¹⁴⁴ A similar theory has been proposed about the likely success of ADR within the construction industry at the present time.¹⁴⁵ A leading law firm has asserted that its clients are opting to litigate in order to gain time and would be uninterested in employing speedier methods of resolution.¹⁴⁶ The construction industry in the UK has been described as being in serious recession in the early 1990s,¹⁴⁷ though this may not be so profound at present. Finance may be a driving factor in the likely success of ADR.

Research of the current views held in the construction industry concerning dispute resolution indicates that there are negative attitudes, not only about the procedures of dispute resolution but also about other personnel involved in the industry. Many of the parties involved in construction mistrust each other.¹⁴⁸ This perception was corroborated by the indicator interviews. Diverse sectors of the industry are blamed for dispute

¹⁴³ Ferguson R. B. (1980) op cit, Arthurs H.W. (1984) op cit.

¹⁴⁴ Ellenbogen A. (1952) English Arbitration Practice Law and Contemporary Problems cited Ferguson R. B. (1980) op cit

¹⁴⁵ Yuille M. (1993) Construction hit by even harder times The Lawyer vol 7 Issue 3

¹⁴⁶ ibid

¹⁴⁷ Latham M. (1993) op cit, Interim Report para 23 of the report.
Flood J. and Caiger A. (1993), op cit They reported the decline of the top ten construction companies profits since the late 1980's. They reported that some companies forecast zero profits for 1992.

¹⁴⁸ Building (1992) numbers 37 and 38 September

problems. The sub/specialists are condemned for not having the necessary expertise. The main contractors are accused of holding the sub/specialists to ransom. The consultants are criticised for not adequately specifying their designs and failing to clarify their brief. One other major catalyst, identified in the indicator interviews, for generating dispute is delay in settling claims.¹⁴⁹

The interim report of the Government and industry review recognised one of the key problems facing construction is that the industry has been in a recession and there is a *"substantial excess capacity and too many firms chasing too little work."*¹⁵⁰ This results in each sector of the industry being distrustful of the other, *"there is no trust at all in this industry any more".*¹⁵¹ The clients feel the need to hire consultants to defend their interest. The professional consultants are concerned that the client is trying to remove them from their traditional adjudicator's role. Contractors fear they will not be paid, or that the monthly certified payment will not reflect the work done or that the specialist sub-contractor will overcharge and they will not make a profit on their streamlined tender price. The specialist sub-contractors fear that they will be either underpaid or paid too late or subject to unreasonable discounts or set offs.¹⁵² The interim report sums up the situation. *"Too little trust- and not enough money."*¹⁵³

4.2.3 Latham Report: Recommendations for Adjudication.

The Latham Report having recognised the adversarial culture and the dissatisfaction with the traditional procedures of dispute resolution, reviewed and made recommendations about dispute resolution.¹⁵⁴ First, conciliation and mediation were briefly considered but

¹⁴⁹ Construction Industry Council Report (1994) op cit The report identifies the major causes of dispute in the construction industry.

¹⁵⁰ Latham M. (1993) Interim Report op cit, para. 23 of the report

¹⁵¹ Latham M. (1994) Final Report op cit, para. 17 of the report.

¹⁵² Latham M. (1993) op cit, paras. 16-17 of the report.

¹⁵³ Latham M. (1993) op cit para. 17 of the report.

¹⁵⁴ Latham M. (1994) Final Report Chapter 9 of the report.

these were largely discounted due to the non-binding nature of the processes and the lack of powers of the mediator/conciliator to enforce the agreement or make a binding recommendation. It has been suggested that Latham may have been "*over persuaded by doubts about non-binding methods*", because the experience of the US points to the relative un-importance of such negative perceptions.¹⁵⁵ However, the Latham report favoured adjudication: *Most disputes on site are, I believe, better resolved by speedy decision- ie adjudication - rather than by a mediation procedure in which the parties reach their own decision.*"¹⁵⁶

It emerged that adjudication had considerable support from some of the indicator interviewees, who represented particular sectors of the construction industry. The representative of the FASS, was of the opinion that it was a particularly attractive option for sub/specialist contractors, who required a cheap, quick and fair procedure. Some sectors of the industry wished to see an extension of the application of this procedure and more provision for it in standard form contracts. A representative of the BPF (British Property Federation), which represents clients, uses adjudication in his company's standard form contract and he contended that their contract minimises the contractors' ability to get out of responsibility for design by ensuring that when they tender for a job, they take on the risk for design as well. The clients are apparently satisfied with the contract.¹⁵⁷ However, other sectors of construction are not so enamoured with the procedure, most notably architects, who feel their traditional role as adjudicator is being eroded.¹⁵⁸

¹⁵⁵ Lavers A. and Bick P. (1995) Construction Industry Reform in the UK The Construction Lawyer November. Lavers and Bick cited Stipanowich T. and Henderson D. op cit. (1992) This work and the negative perceptions are discussed in chapter 2 paras. 6-6.2

¹⁵⁶ Latham M. (1994) Final Report op cit para. 9.8 of the report.

¹⁵⁷ The spokesperson for the BPF is the managing director of a client organisation. He reported that his company have used this contract on approximately 25 occasions and have only had 2 disputes which have gone to adjudication. He expressed satisfaction with the procedure, despite losing on one decision.

¹⁵⁸ Latham M. (1993) Interim Report op cit, and indicator interviews.

4.3 Housing Grants, Construction and Regeneration Act 1996.

The Latham recommendations for adjudication have largely been enacted under section 108 of the Housing Grants, Construction and Regeneration Act 1996, which makes the procedure a statutory right for construction contracts.¹⁵⁹ The Act was given Royal Assent in July 1996, but at the time of writing, has not come into force. Under the Act the parties may use arbitration or litigation but if one party wishes to adjudicate, this is now a statutory right.¹⁶⁰

The aim of the Act is to provide a quick, binding dispute resolution procedure which will enable the construction project to continue to the end of practical completion. The parties will be entitled to name an adjudicator and/or an adjudication scheme, which will be used if it reaches the criteria; which the Act lays down. The criteria involve a stringent time scale where the adjudicator must be appointed within 7 days of disputes being referred.¹⁶¹ The adjudicators must reach their decision within 28 days.¹⁶² This period may be extended by up to 14 days, with the consent of the party who referred the dispute.¹⁶³ There is a duty conferred on the adjudicator to take the initiative in ascertaining the facts and the law and to act impartially.¹⁶⁴ If the parties do not specify an arbitration scheme in their contract, or the scheme does not meet the criteria stated above, the Government's Scheme for Construction Contracts will apply. The process of consultation to produce the Scheme has not yet been completed and the Scheme will have to be enacted by statutory instrument.

¹⁵⁹ Part II of the Act applies to any "construction contract" which is defined as any agreement for the carrying out of construction operations.

¹⁶⁰ Kent L. (1996) The Latham Legislation Construction Law Vol 7 Issue 5 November

¹⁶¹ S108(2)(b)

¹⁶² s108(2)(c)

¹⁶³ s108(2)(d)

¹⁶⁴ s108(2)(e)

4.3.1 Criticism of adjudication

Commentators have suggested that the current proposals for adjudication may not produce a quick and cost effective dispute procedure, which is suitable for all construction disputes. It has been suggested that one major weakness of adjudication in its present form is that when the arbitrator is unable to reach a decision on complex issues in the time frame allowed, the parties are allowed to treat the adjudication as failed and start again.¹⁶⁵ It is maintained that this event puts the parties back to the position that they were in before the adjudication began, fails to resolve the dispute and will, thus, create further delay in the resolution of construction disputes.¹⁶⁶ Commentators and legal practitioners believe that some mechanism should be provided whereby the adjudicator makes a decision on a "*fair commercial basis*"¹⁶⁷ when the issues are too complex to be decided in such a short time frame. Thus enabling the contract to go on until practical completion.

It has been suggested that the stringent time-table will make the decision too hasty and thus, lead frequently to either arbitration or litigation, which will consequently lead to further expense and delay.¹⁶⁸ Criticism has been made to the effect that the Act does not specify who decides whether the minimum criteria have been met, which will create uncertainty, and, it has been suggested, will lead to parties using this weakness to create delay.¹⁶⁹ Further, it is contended that legal advisors, who represent main contractors, acknowledge that a major part of their practice is creating delay and they will discover

¹⁶⁵ Department of the Environment (DOE) (1996) Making the Scheme for Construction Contracts consultation paper issued by the DOE November. B39.1

¹⁶⁶ Helps D. (1996)(a) Building December
Editor Construction Law (1997) Vol 8 Issue 1 February
Official Referee's Solicitors Association published a paper in November 1996, cited in Construction Law 1997 Vol 8 issue 1

¹⁶⁷ *ibid*

¹⁶⁸ Kent L. (1996) *op cit*

¹⁶⁹ Helps D. (1996)(b) Part II of the Housing Grants, Construction and Regeneration Bill
Construction Law Vol 7 Issue 2 June/July

methods to manipulate adjudication by making it a further "hoop" to be gone through.¹⁷⁰

5 Alternative Dispute Resolution.

5.1 Advantages of ADR.

It is against this background of conflict in the construction industry, where there is a climate of distrust, adversarialism and a perception of litigiousness, that the proponents of ADR are addressing the industry through industry publications. A substantial amount of the construction literature is in the form of promotional material from advocates of ADR.¹⁷¹ ADR is compared advantageously to the formal systems, in particular in terms of costs, speed and a less adversarial approach:

*"The different ADR methods...have in common the aims of blunting the adversarial attitude and encouraging more openness and better communication between the parties to a dispute. This leads to earlier settlement in appropriate cases with a saving in managerial and legal time, expense and worry. A by-product of ADR is that it is much more likely, where relevant, that the parties can continue to work together after the dispute has been terminated."*¹⁷²

It is claimed that one of the advantages ADR has over the formal systems is that the parties are able to construct an alternative to suit their own requirements.¹⁷³ Therefore, it is flexible in comparison with the perceived rigidity of the formal systems. The three primary processes of dispute resolution have been identified as negotiation, adjudication and mediation, which can be combined to produce other hybrid processes,¹⁷⁴ such as

¹⁷⁰ Minogue A. (1996) Crystal Tips for Specialists Building September

¹⁷¹ Some eggs:

Mackie K.J. (1992) op cit, Dixon G. and Carroll E.(1990) op cit

¹⁷² Bevan A. (1992) op cit

¹⁷³ Brown H.(1989) op cit

¹⁷⁴ Goldberg S.B., Green E.D. and Sander F.E. (1985) Dispute Resolution Little Brown and Company: Boston It is suggested that when these three primary processes are combined they result in a variety of hybrid processes. Thus for example, one can

Med-Arb,¹⁷⁵ Concilio-Arb,¹⁷⁶ Rent a Judge/private judging, early neutral evaluation and the mini-trial: (This is called the Executive Tribunal in the UK literature.)

*"It should always be remembered that one of the strengths of ADR is its very flexibility, and that the parties can tailor the form and procedures to the dispute before them."*¹⁷⁷

Effron uses the characteristic of *"intrusiveness"* to distinguish the processes.¹⁷⁸ This is the degree of involvement of the neutral chosen by the parties to the dispute. The parties must accept the judge's decision, thus, courts are the most intrusive. Arbitrations are less intrusive, as the parties must themselves provide the agreement for the arbitrator to give the decision. The least intrusive is mediation. Although the neutral may organise the meetings and lead the discussions, the final decision on settlement is normally left to the parties. The parties choose both the level of intrusiveness and whether the decision and/or the decision making process is to be taken out of their hands. Thus, the parties could decide to have a non-intrusive mediation to begin with and then, if no settlement is reached, agree for the mediator either to make recommendations or provide a decision.

The proponents of ADR claim that the complex procedures and specialised language of arbitration and litigation result in a dependence on the professional lawyer and take away

have the Mini-trial (Executive Tribunal), with adjudication like presentation of arguments combined with negotiation.

¹⁷⁵ The same neutral who is the mediator, with the consent of the parties, is permitted to arbitrate the dispute, if the parties do not reach a settlement

¹⁷⁶ Williams R. (1988) Development of Concilio-Arbitration Nottingham Symposium on ADR. This is Rowland Williams' original concept, where the parties must seek the opinion of an independent expert in a condition precedent clause. The opinion is not binding but a party not accepting it and failing in litigation has to pay the cost of both the parties on a indemnity basis.

¹⁷⁷ Stephens R. J. (1992) Civil Litigation, Arbitration and ADR: Will ADR take over? 3 ICCLR 89

¹⁷⁸ Effron J. (1989) Alternatives to Litigation: Factors in Choosing Modern Law Review. July vol 52

the autonomy of the parties to the dispute.¹⁷⁹ ADR, the advocates claim, gives the parties autonomy and allows them to participate in their dispute. This is reinforced by studies of client perceptions of the litigation process, which show that, contrary to the lawyers' perception that the client's primary concern is about winning, the parties are more concerned about the fairness of the process.¹⁸⁰ In ADR, the parties participate in the dispute and are, it is claimed, more likely to accept the settlement outcome and have a better feeling about the whole experience:

*"..the fact that the litigants participate more actively in this kind of forum (ADR) and while an advocate will often present their case, the informality of the proceedings often leaves the party 'feeling good' at the fact that they have had their day in court. The forum itself is far less threatening than either a court room or arbitration proceedings and the litigant has a much greater opportunity to identify directly with the decision making aspects of the proceedings."*¹⁸¹

Another of the claimed advantages of ADR is the saving in costs compared to the formal systems. It is estimated that 80-90% of cases settle before they reach the court and that frequently this is on the "steps of the court house".¹⁸² The costs involved in arriving at this position, in terms of preparation, legal fees and management time, are said to be saved by using ADR. Frequently assertions are made that ADR has high levels of reaching settlement¹⁸³ and typically mediation is often promoted as achieving settlement

¹⁷⁹ Auerbach J. (1983) op cit

¹⁸⁰ Tyler T. (1988) op cit, E. Allan Lind et al (1989) op cit Cited in Zander M. (1995)(a) op cit

¹⁸¹ O'Connor P. (1992) op cit

¹⁸² Williams Rowland (1987) op cit, Newey J. (1992) op cit, Dixon G. and Carroll E. (1990) op cit

¹⁸³ See Chapter 2 paras. 5.1 and 5.3 below for the results of empirical research into the construction industry and the settlement rates of ADR.

rates of 80-90%.¹⁸⁴

*"..some ADR mechanisms work better than others in any given case. But what they all share are two characteristics: they are all attempts to save legal and management time and money and they try to take at least some of the edge off the adversarial attitude."*¹⁸⁵

The proponents of ADR state that the features that all the procedures have in common is: consensus, continuity, control and confidentiality.¹⁸⁶ ADR can only be used with the consent of all of the parties, therefore, it can only be adopted if all agree at the outset. Such agreement is more likely to provide a good base for attempting to reach a settlement. The nature of ADR is such that it removes the adversarial approach, which is adopted by the parties to the dispute and thus, is more likely to result in the parties being able to continue a relationship afterwards. It is suggested that new business arrangements can be proposed as part of the settlement. The parties are able to control the process and, therefore, able to construct a commercial decision, rather than have to accept a legal decision which applies a strict interpretation of the law.¹⁸⁷ Finally, ADR has the advantage over litigation, although not arbitration, in that it is confidential and the parties may avoid bad publicity or a loss of credibility.

5.2 Criticism of ADR

5.2.1 The argument for formalism

Having considered some of the underlying factors, which are likely to be involved in the development of ADR and the advocated advantages of ADR, it is desirable to review briefly some of the criticisms and reservations that have been expressed by legal academics and theorists as to the use of informal justice mechanisms. The arguments centre around three areas:

¹⁸⁴ CEDR and ADR Europe both claim 80%, or over, settlement rates for mediation in their information literature.

¹⁸⁵ Allison J.R. (1990) op cit

¹⁸⁶ O' Connor P.(1992) op cit , Dixon G. and Carroll E. op cit

¹⁸⁷ O'Connor P. (1992) op cit, Dixon G. and Carroll E. op cit

- I. The perception of informalism as an unfair process for unequal members of society.
- II. The role of the legal process as a safeguard of fundamental rights and its function in the development of the law.
- III. The implication that there are underlying purposes by state and capitalism to control and manipulate ADR and the people who use them.

One of the leading opponents of ADR in the American legal system is Professor Owen Fiss,¹⁸⁸ who does not believe the procedures should be "*encouraged*" or "*praised*". In his view, the settlement of civil disputes is the equivalent of plea bargaining. He argues that ADR assumes that settlement is the parties' prediction of going to court, which is based on the assumption that there is equality between the parties. Where there are inequalities, these may distort the judgment of the parties and the presentations they give. Fiss believes that the resources of the parties are frequently distorted. It is in these circumstances that Fiss considers that the judge has limited power to lessen the impact by asking questions, calling witnesses and inviting other institutions to participate.

Although the argument is particularly relevant to those disadvantaged in terms of race, gender or finance, it may be pertinent to many disputes in business, where there is an imbalance in resources. Frequently, financial resources and power between parties in the business context are not equal and this may have an adverse affect in ADR: "*ADR is a clear and present danger for the individual and for smaller businesses.*"¹⁸⁹ The research was narrowed to the contracting sector of construction, where there can be enormous disparity between size of organisations and financial resources.¹⁹⁰ This potential disadvantage of ADR is, therefore, of relevance to the study and resulted in a

¹⁸⁸ Fiss O. (1974) op cit

¹⁸⁹ Guill J.L. and Slavin E. A. (1989) Rush to Unfairness: The Downside of ADR The Judges Journal Vol 28

¹⁹⁰ See chapter 3 paras. 4-4.1 and 5.2-5.2.2.2

consideration of the differences of perceptions about dispute resolution between sizes of contracting operation.

The argument against informal justice is further extended by the theory that ADR could deny the citizen or institution their rights by denying them the protection of due process of law. There is scepticism that some of the new procedures of ADR will afford the necessary protection. *"Due process of the law is the handmaiden of equal justice, regardless of the standing of the party....Its relevance to ADR is paramount."*¹⁹¹

Auerbach believes that it is unwise to believe that ADR can accomplish what the law is unable to do and diverting disputes away from the courts is likely to make justice even more inaccessible and likely to emphasise inequalities:

*"The historical progression is clear, from community justice without formal institutions to the Rule of Law, all too often without justice. But injustice without law is an even worse possibility, which misguided enthusiasm for alternative dispute settlement now seems likely to encourage."*¹⁹²

A further argument against ADR is that it assumes that judgement and settlement is the end of the conflict.¹⁹³ The appeal of ADR is to avoid costs and an uncertain result, but Fiss argues that if a party has to return to the court to ask for a review of the settlement then this will increase the costs, as the case must be reconstructed. Finally, Fiss contends that the court's role is more than just settling disputes. It is involved in the interpretation of the law and if it is denied this function then the development of the law is stultified.

Other writers believe the development of ADR conceals deeper motives of control and

¹⁹¹ Guill J.L. and Slavin E. A. (1989) op cit

¹⁹² Auerbach J.(1984) op cit

¹⁹³ Fiss O. (1974) op cit

manipulation by the state and capital.¹⁹⁴ Abel contends that capital uses informalism, such as grievance mechanisms for the consumer, to legitimise their actions when they increase in size and remoteness. Similarly, Auerbach asserts that state institutions provide alternatives to alleviate discontent with the courts and preserve the stability of the state:

"It is therefore necessary to beware of the seductive appeal of Alternative institutions. They deflect energy from the political organisation by groups of people with common grievances, or discourage effective litigation strategies that could provide substantial benefits."

Both Nader¹⁹⁵ and Abel¹⁹⁶ believe the control and manipulation of society is achieved through the utilisation of the ideologies of harmony and reciprocity. By using a restrictive code¹⁹⁷ and "Orwellian newspeak",¹⁹⁸ the rhetoric of harmony is accepted with the intention of preventing the expression of conflict. Nader believes the ADR movement is symbolic of an ideological struggle rather than the response to problems of access to justice. Abel believes that informal institutions expand state control by giving authority and status to those who create and manage them.

5.2.2 Control and manipulation of ADR in the UK?

Control and manipulation of arbitration has been borne out by the discussion on the experiences of arbitration, with the increasing involvement of the formal system.¹⁹⁹ The progression of adjudication can be compared to arbitration. It has developed from an

¹⁹⁴ Abel R.L. (1982) op cit , Auerbach J (1984) op cit , Roberts S. (1992), Robertshaw P. and Segal J. (1993) op cit, Guill J. and Slavin E. (1989) op cit.

¹⁹⁵ Nader L. (1989) op cit

¹⁹⁶ Abel R. L. (1982) op cit

¹⁹⁷ Nader L. (1988) op cit

¹⁹⁸ Abel R.L. (1982) op cit

¹⁹⁹ See chapter 2 paras. 2-2.3

agreed contract clause and, when the Housing Grants, Construction and Regeneration Act 1996 comes into force, will be a statutory right. The formal system has shown interest in alternatives in other ways. In 1993, the Commercial Court issued a Practice Statement indicating that its judges wished to encourage parties to consider the use of ADR.²⁰⁰ The consequence of this is that the parties have to complete an amended pre-trial check list before the summons for directions, which asks if ADR has been considered.²⁰¹

In June 1996, the Commercial Court issued another Practice Direction, which requires further steps to be taken to encourage the use of ADR and more active involvement on the part of the formal court system.²⁰² Judges must now adopt the following practice. When judges conduct the first hearing and all subsequent hearings for directions, if it appears that the action, or any issues, are appropriate for ADR, and this had not been done, they may invite the parties to set in motion ADR procedures and in appropriate cases can adjourn the proceedings. Either party may raise the issue of ADR to the judge at any time after the proceedings have been issued. If a party rejects an offer to use ADR, they must justify the decision to the judge. Finally, the judge may offer to provide early neutral evaluation, either himself or with another judge. If the judge does provide an early neutral evaluation, he will not take any further part in the proceedings, unless the parties agree. It is estimated that "ADR orders" are being made in about 30% of cases.²⁰³ It has been implied that this is a subtle suggestion for the parties to drop the case.²⁰⁴

The Woolf Report also made proposals for ADR. In multi-track cases at the case

²⁰⁰ Practice Statement issued by the Commercial Court 10 December 1993

²⁰¹ In January 1995 the other divisions of the High Court introduced the same ADR questions into their pre-trial check list.

²⁰² Practice Statement issued by the Commercial Court 7 June 1996.

²⁰³ Newark C. (1997) Business options Law Society Gazette 94/1 8 January

²⁰⁴ Bingham T. (1996) Invitations you can't refuse Building 5 July

management meetings, the parties should be required to state whether they have discussed ADR and if not, why not. The report goes further than the practice direction, as it is suggested that the judges should be able to take into account the parties' unreasonable refusal to attempt ADR or an uncooperative attitude in ADR, when deciding on the future conduct of the case and orders to make costs.²⁰⁵ In his Interim Report, Lord Woolf expressed reservations about mandatory ADR and did not recommend compulsory ADR in the final report, however, he states that he is "*less certain*"²⁰⁶ of this view, due to the successfulness of this approach in other countries.

Currently, the Lord Chancellor has approved ADR pilot schemes at the Central London County Court and the Patents County Court.²⁰⁷ It is reported that there has not been a high take up of the offer of mediation services at the Central London Court and Burn suggests that this is due to a misunderstanding about mediation by solicitors.²⁰⁸ The implementation of mandatory ADR would require statutory intervention. Research from other countries has shown that the effect of mandatory mediation or conciliation either through court or contract agreement has resulted in less effective results²⁰⁹ as the parties are less likely to reach a settlement when it is forced. Academics are critical about the involvement of the state in informal procedures as it conceals manipulation and control and reduces the protection afforded by an open court.²¹⁰

"Private, informal procedures which enjoy the authority of the courts, but which are

²⁰⁵ Woolf Lord (1996) Final Report op cit Chapter 5 para. 18 of the report.

²⁰⁶ Woolf Lord (1995) Interim Report op cit
Woolf Lord Final Report (1996) op cit chapter 5 para. 18 of the report.

²⁰⁷ The Way Forward Lord Chancellors' Department October 1996

²⁰⁸ Burn S. (1997) A Middle Course Law Society Gazette 94/1 8 January "By early December 1996, 38 mediations had taken place and 20 more were in the pipeline."

²⁰⁹ Stipanowich T. and Henderson D. op cit
Ingleby R. (1993) Court Sponsored mediation: The Case against Mandatory participation Modern Law Review Vol 56
Roberts S. (1992) op cit

²¹⁰ Abel R.L. (1982) op cit

stripped of the procedural safeguards of adjudication carry the risk of unregulated coercion and covert manipulation."²¹¹

5.3 ADR and the US Construction industry.

Many claim that disputes in the construction industry are suitable for ADR because the nature of the dispute can be complex and detailed, which adds to the cost and length of seeking resolution through the formal procedures.²¹² The US experience suggests that many ADR procedures are being successfully utilised in the construction industry²¹³ and there are documented cases of the disparate procedures being used effectively in different types of construction disputes.²¹⁴ The ABA survey reported on the experience of lawyers with ADR procedures in the US construction industry²¹⁵ and found that a full settlement of 57.4% was reached for all types of ADR and partial settlement in 8.4% of cases. The majority of mediations were concluded in 3 days (82.9%) and nearly half were completed either successfully or unsuccessfully in one day. 64% of Mini-Trials were completed in 3 days, though less than a quarter lasted for 1 day. The survey confirmed the success in terms of speed and costs of non-binding ADR in the

²¹¹ Roberts S. (1992) op cit

²¹² Dixon G. and Carrol E. (1990) op cit, Mackie K. (1992) op cit, Royce N. (1989) op cit, Holland H. E. (1992)

²¹³ Siedel G J. (1992) The Use of the Mini-trial to resolve construction disputes. Proceedings of the First International Conference on Construction Management and Dispute Resolution. UMIST
Salomone W.G. (1990) On the Road to Mediation: Resolving Public Highway Construction Disputes. The Arbitration Journal March Vol 45 no 1
Lodigiani S. P. A. (1986) A Claims Review Board as a Way for Amicable Settlement of Disputes. The International Construction Law Review.
Stipanowich T. and Henderson D.A. (1992) op cit
Hinchey J. W. (1996) Evolution of ADR techniques for major construction projects in the 90s and beyond: A US perspective Construction Law Journal Vol 12 No 1

²¹⁴ Felsen F.D. (1989) Mediation that Worked: Role of OSHA in L'Ambiance Plasa Settlement Journal of Constructed Facilities Vol 3 No 4
Izibiky J. and Savage C. (1989) ADR Explanations, Examples and Effective Use The Colorado Lawyer May vol 18
Gaede A. H. (1991) op cit, Stipanowich T. and Henderson D. A. (1992) op cit

²¹⁵ Stipanowich T. and Henderson D.A (1992).op cit

construction industry.

More recently, a multi-disciplinary survey on dispute avoidance and resolution in the US construction industry revealed that there is a growing trend to favour alternatives to litigation, with mediation being the most familiar.²¹⁶ The survey reported a *"spectacular growth"* in the use of the process in the last decade. However, the survey found that different sectors of the industry found various procedures more effective in terms of goals relating to such issues as reducing costs, reducing dispute resolution time, providing realistic understanding of strengths and weaknesses of one's case, preserving relationships, opening channels of communications, minimising future disputes and meeting job budgets. Thus, for example: lawyers and contractors rated mediation relatively high, whereas architects and engineers appear to favour project partnering and early neutral evaluation for many of the goals tested. What the survey does indicate is a growing awareness and increasing use of ADR in the US construction industry and it provides information relating to savings, in terms of time and cost, of the different procedures.

5.4 ADR in the UK Construction Industry.

In the UK, most of the professional bodies in both construction and the legal profession have appointed working parties to report on conflict and dispute resolution. In 1994, The Construction Industry Council (CIC) set up a task force, whose terms of reference were to identify the disputes which arise in all parts of the construction industry and existing methods of resolution.²¹⁷ The report identified all the bodies and professions which offered ADR services and advice or had registers of ADR neutrals and concluded: *"In general ADR in the UK is already developed as a substitute to the more formalised and lengthy statutory arbitration or litigation. There would, therefore, seem little point in the CIC developing yet another system."*²¹⁸ However, it recommended that some co-

²¹⁶ Stipanowich T.J. (1995) Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution Part 1 The Construction Lawyer.

²¹⁷ Construction Industry Council Report (1994) op cit

²¹⁸ Construction Industry Council Report (1994) op cit

ordination between the schemes and a central register of dispute advisors might be considered.

Despite the long list of available ADR services, it is difficult to assess the actual incidence of ADR. A conflicting picture was drawn from the indicator interviews. Several trained mediators/conciliators, who were on different professional institutions' panels, stated that they had never had an official reference. The RICS representative reported that, in response to a questionnaire of parties interested in ADR they had 200-250 replies and that at the time of the interview 70 chartered surveyors had chosen to advertise ADR in their directory. They were in the process of setting up a panel of mediators but at the time of interview could not claim that they had made any references. A survey conducted in the construction industry reported that ADR experience in the UK is limited and concluded: *"The current usage of techniques shows a minimal UK experience with ADR."*²¹⁹ However, the survey findings suggested that in the next five year period there will be a move away from the traditional techniques of arbitration and litigation towards mediation and adjudication.²²⁰

6 Negative Perceptions of ADR

6.1 US Negative Perceptions.

Thus far the discussion has indicated that there are parallels between the UK and the US construction industry about the perceptions and the experience of resolving disputes using the formal systems.²²¹ The literature reveals that there is a wealth of information on ADR in the US construction industry, much of it demonstrates the perceived advantages of ADR in the resolution of disputes and documents successful cases of ADR procedures being used for different disputes.²²² However, Stipanowich and Henderson noted that

²¹⁹ Fenn P. and Gould N. (1994) Dispute Resolution in the UK Construction Industry. International Multidisciplinary Conference on Dispute Avoidance in the Construction Industry.

²²⁰ *ibid*

²²¹ See chapter 2 paras. 1-1.3 and 4-4.1.2

²²² See chapter 2 paras 5-5.3

negative perceptions of ADR existed in the US literature.²²³ For example: there are perceptions that when a party suggested using ADR, it showed a lack of confidence in the case, that using ADR results in a detriment as it reveals trial strategy and there was also a perception that ADR was used as a "pressure to settle" tactic. The hypothesis was that there was a lack of empirical data about the new procedures, which may have resulted in a misapplication or incorrect choice of process. The aim of the American Bar Association (ABA) survey was to test the negative attitudes and accordingly supplant anecdote and hearsay with actual hard data on the attitudes and experience of US lawyers involved in the US construction industry.

The ABA survey indicated that the views of mediation and mini-trials depicted in the literature did not tally with the experiences of construction lawyers. 86% of the survey respondents disagreed with the statement that proposing mediation is a sign of weakness and almost 90% did not believe proposing a mini-trial indicated a weakness. The results disclosed that the survey group were relatively unconcerned with the revelation of trial strategy or confidential information, when using either procedure. Only 5% of the respondents believed that *ADR causes problems with delay and disruption of litigation or arbitration*. The "pressure to settle" hypothesis also received little support from the results of the survey, as ADR success did not appear to depend on the initiation of arbitration or litigation.

6.2 Negative perceptions in the UK.

The ABA research and the early literature search of the UK construction industry led to the research premise that similar negative perceptions may be replicated in the UK construction industry. The literature search had disclosed that both positive and negative attitudes are being constructed. Many of the positive advantages of ADR are in the form of promotional material from interested organisations and individual proponents, who had undergone ADR training.²²⁴ The most frequently presented negative perceptions of ADR

²²³ Stipanowich T. and Henderson D.A. (1992) op cit

²²⁴ Some examples: Mackie K. (1992) op cit, Royce N. (1989) op cit, Watson A. (1992) op cit, Hollands D.E. (1992) op cit, Collins A. (1992) op cit

in the literature are:

Proposing or using ADR is a sign of weakness.

ADR reveals the company's position to the opposition and could result in settlement without knowing the true facts.

ADR is non-binding, this is a weakness.

ADR is a form of "pressure to settle" and leads to compromise.

ADR can be used to create delay.

The indicator interviews did not generally demonstrate that the negative perceptions were extensively at play. The most consistent concern seems to be with use of ADR to create delay in dispute resolution. The perceptions that ADR is a sign of weakness and reveals too much of the trial strategy were only remarked on by the legal advisors who were reluctant to recommend ADR if they saw the other side using it tactically and they were specifically cautious about advising on ADR before the full facts of the dispute were known. More cynically, the implication was made that ADR claims to produce results which are a commercial reality, "*finding the acceptable deal*", which does not take account of the abstract concepts of rights and wrongs of the dispute. The ADR neutral, it was implied, does not take on the responsibility of the trained arbitrator and the judge, that of deciding the issues on notions of justice. It was contended that this commercial reality could be equated to power structures, the more powerful using ADR to achieve the desired result. These arguments about ADR are not new and have been discussed earlier.²²⁵

The literature search and the interviews had identified the fact that there was some evidence of negative attitudes and this, therefore, led to the formulation of the second hypothesis, which was to be tested: Main contractors and sub/specialist contractors hold negative perceptions about ADR.

Further, the literature search and the interviews revealed that there is little evidence of

²²⁵ See chapter 2 paras. 5.2-5.2.1

using ADR.²²⁶ This led to the formulation of the third hypothesis to be tested: Negative perceptions are influencing the development of ADR.

6.3 Perceptions of the Appropriateness and Limitations of ADR.

The literature review disclosed another aspect of ADR. A debate was evident between the advocates of ADR and the opponents, which centred around the perceived limitations of ADR to specific construction disputes. Some of the literature suggests that ADR is more suitable to financially small construction disputes. The effectiveness of litigation or arbitration for disputes below £50-£100,000 has been questioned²²⁷ and some commentators perceive that it is in this area that ADR would be most likely to be beneficial.²²⁸ Others question the appropriateness of ADR when there are complex questions of law or construction of legal documents.²²⁹ Different views are expressed in the literature about the use of ADR for multi-party disputes. Some believe that the flexibility of ADR is ideal for such disputes,²³⁰ whereas others believe that these should be left to the formal systems.²³¹ One objective of the research is to make an appraisal of the potential use of ADR.²³² Therefore, an investigation of the samples' attitudes and perceptions of ADR on these issues was necessary, to assess the likely influence they may have on the choice of ADR as a dispute resolution procedure.

7 Legal involvement in ADR.

The report of the manipulation of arbitration and litigation, particularly by legal

²²⁶ Fenn P. and Gould N. (1994) op cit

²²⁷ Miles D. (1992) The Problems of Using ADR in the Construction Industry First International Conference on Construction Management and Dispute Resolution. UMIST

²²⁸ Construction Industry Council Report (1994) op cit

²²⁹ Stephens R. J.(1992) op cit

²³⁰ Totterdill B.W. (1991) op cit
Naughton P. (1990) op cit

²³¹ Royce N. (1989) op cit

²³² See chapter 1 para.2.2 and chapter 3 para. 1.2

advisors, led to the conjecture that this distrust may eventually spread to ADR and prevent it reaching its full potential role in resolving construction disputes. The literature review evidenced mixed attitudes about the involvement of lawyers in ADR. Some commentators view the future of ADR with scepticism if lawyers are involved.²³³ Others perceive the role of legal advisors as a vital component, because they provide protection for the legal rights of the parties.²³⁴ The implication from much of the literature is that ADR provides a reduced role for legal advisors and thus reduces legal costs in dispute resolution.²³⁵

Several representatives in the indicator interviews expressed concern that lawyers would be instrumental in its development. It was intimated that lawyers have a vested interest in not settling the dispute. Frequent comments were made that ADR would be manipulated by the lawyers' *"hi-jacking"* the new procedures. This would be achieved in two ways: either by monopolising the procedures by becoming ADR neutrals and by representing the parties in ADR or, by stultifying its development by not recommending ADR for the disputes on which they were advising. The concept of *"defensive marketing"* has been defined:

"Rule 1: The strategy - keep the old products (and the fees that go with them) while manipulating the image to suggest the new service is on offer.

*Rule 2: The tactic - suggest to the client that nearly every case is suitable for ADR except the one he has in front of him where unique circumstances apply requiring 'that old adversarial magic'"*²³⁶

This view was supported by the comments of a construction lawyer, who stated in the

²³³ Davies R. (1992) op cit

²³⁴ Tyrrel J. (1992) Conciliation and Mediation of International Commercial Disputes- The Lawyers Role The International Law Review.
Roberts S. (1993) op cit

²³⁵ O'Connor P. (1992) op cit

²³⁶ Miles D.R. (1992) op cit

indicator interviews that ADR is used as a marketing device by lawyers to improve the poor profile that they have had since the 1980s:

"The state of play of ADR is that there was huge criticism of the legal process after the 80s. Lawyers saw ADR as a marketing salvation. So it has been heavily marketed. They profile themselves with ADR: Paid lip service. The truth is they give ADR a profile. They use it cynically for marketing."

Legal academics outside the construction field have commented on the monopolisation by lawyers in the current development of ADR in the UK.²³⁷ The official representatives of the solicitors, the Law Society and the Bar Council both made reports on ADR²³⁸ and have been reported to show *"an active proprietorial interest"*.²³⁹ The General Council of the Bar Committee recommended that a court-based mediation service should be set up and that the mediators should be lawyers of at least 7 years' experience. Roberts²⁴⁰ has criticised both reports on a number of grounds: There was a failure to recognise the vested interest of the proponents of ADR, Government's wish to reduce spending on the courts, the judges' interest in wishing to reduce the pressure on the courts and the professional bodies who want to secure more work:

*"...it is hard to avoid the conclusion that lawyers are here rushing to colonise an apparently promising area of work without pausing to consider what sort of role they could sensibly be performing."*²⁴¹

Fiss, in his argument against informalism, stated that settlement is the result of the

²³⁷ Roberts S. (1992) op cit Roberts S. (1993) op cit

²³⁸ Brown H. (1991) op cit Beldon R.(1991) op cit

²³⁹ Roberts S. (1993) op cit

²⁴⁰ Roberts S. (1993) op cit

²⁴¹ Roberts S. (1993) op cit

parties' prediction of the outcome of going to court.²⁴² They bargain in the shadow of the law.²⁴³ One of the tenets of the American Realists is that law is a prediction of what the courts will do in fact and the role of the legal advisor is to assist in this task.²⁴⁴ What a party wants to discover is what the law is going to say if the case goes to court.²⁴⁵ Most people are unable to judge this for themselves and, therefore, require assistance from legal advisors. It has been suggested that in construction disputes recourse to ADR is unlikely in large disputes without legal advice:

*"In a high value claim it is unlikely that any company executive will take the decision to use ADR of his own initiative without prior consultation with his advisors."*²⁴⁶

In the indicator exercise, a construction solicitor interpreted the role of the lawyer in the process of dispute resolution as providing strength to their clients' argument, in order to facilitate the best possible settlement: *"maximise the negotiation power of their client so that they can resolve from strength.."*

The literature and the indicator interviews raised the possibility of legal monopoly.²⁴⁷ Many groups and organisations offering ADR training are predominately made up of lawyers²⁴⁸ and some sections of the construction industry are concerned about the potential involvement of lawyers in ADR. If legal advisors are consulted in the dispute resolution process in the construction industry, their attitudes and perceptions about ADR

²⁴² Fiss O. (1974) op cit

²⁴³ Mnookin R. and Knornhauser L. (1988) op cit

²⁴⁴ Riddall J.G.(1991) op cit Cited Oliver Wendell Holmes. (1897) The Path of the Law 10 Harvard Law Review

²⁴⁵ Riddal J.G. (1991) op cit

²⁴⁶ Miles D.R. (1992) op cit

²⁴⁷ Robertshaw P. and Segal J. (1993), Roberts S. (1992) and (1993)

²⁴⁸ Robertshaw P. and Segal J. (1993) op cit
Miles D.R. (1992) op cit, who comments on IDR Europe, which trains solicitors to be mediators and CEDR which is predominately made up of lawyers.

and dispute resolution are likely to affect the advice they give and, thus, the potential choice of ADR as a dispute resolution procedure. Therefore, it was judged to be essential to investigate the perceptions and attitudes that legal advisors have towards ADR. These factors, together with the legal theories that people bargain and settle their disputes using the outcome of the court as a benchmark and the role of lawyers as predictors of the law, led to the formulation of the fourth hypothesis of the research: Legal advisors in the construction industry are influencing the development of ADR.

This chapter has examined the background to the phenomenon of ADR in the construction industry and related how the theories were developed to account for this development. The following chapter describes the aims and the objectives of the thesis and the development of the hypotheses. A description and justification is given for the chosen methodology, which was designed to achieve these objectives and to test the hypotheses.

CHAPTER 3

METHODOLOGY AND RESEARCH DESIGN

The aim of this thesis is to investigate the factors which impact on the development and choice of ADR as a dispute resolution procedure in the UK construction industry. This chapter explains how the research methodology was devised to achieve that aim. An examination is made of the research process which was adopted. The objectives and the hypotheses, which were developed to accomplish the aim of the thesis, are examined. There is a detailed description of the research design and a justification of the research methodology.

1 The research process

Many writers have described a research process or research logic.¹ This research process was a model but not the pattern for the thesis, as this process need not conform rigidly to a linear form.² The following list describes the research process which was adopted.

- I. Formulation of a theory to explain the phenomenon of the growing interest in ADR in the construction industry.
11. Deduction of hypotheses to explain the phenomenon.
111. "Operationalization " of the hypotheses.^{3,4}

¹ De Vaus D. A. (1996) Surveys in Social Research 4 edition, UCL Press: London.
Bouma G.D. and Atkinson G.B.J. (1995) A Handbook of Social Science Research Oxford University Press.
Bryman A. and Cramer D. (1992) Quantitative Data Analysis for Social Scientists Routledge: London.

² Bryman A. (1988) Quantity and Quality in Social Research Unwin Hyman: London.
Bryman A. and Cramer D. (1992) *ibid*

³ Bridgeman P.W.(1927) The Logic of Modern Physics London Macmillan cited in Bryman A. and Cramer D. (1992) *op cit*

⁴ This is the translation of the hypotheses into variables from which the objects of the research differ. Bryman A. (1988) *op cit*

- IV. Selection of the subjects of the research.
- V. Design of research methodology.
- V1. Collection and analysis of the data.
- V11. Relating the findings back to the theory to confirm or reject it.

This chapter follows the above stated research process. It contains a brief summary of the theory.⁵ A description is given of the objectives and hypotheses which were formulated. There is an explanation of the choice of the subjects of the study. Each part of the research methodology is given a detailed description and justification. Finally, the method of collecting and analysing the data is delineated. The subsequent chapters will analyse the data and draw conclusions on the thesis.

1.1 Aim of the Thesis and Development of Objectives

The stated aim of this thesis is to investigate the factors which impact on the development and choice of ADR as a dispute resolution procedure in the UK construction industry. To accomplish this aim, data are needed on the factors which influence the choice of ADR in the construction industry. The literature search confirmed that no such data existed in the United Kingdom. Therefore, the purpose of the research design is to provide such data (statistical and qualitative) and its analysis. With these data and analysis, an appraisal of the potential contribution of ADR to the construction industry will be made.

1.2 Objectives:

The following objectives were formulated to achieve the stated aim of the thesis:

- i. To investigate the perceptions of key personnel and the professions involved in the construction industry towards dispute resolution procedures, in order to provide

⁵ See chapter 2 generally.

evidence concerning the factors and perceptions which influence the choice of ADR as a dispute resolution process.

- ii. To investigate the factors which influence the choice of ADR as a dispute resolution process within the construction industry.
- iii. To investigate the perceptions of the key personnel towards the involvement of each other in the dispute resolution process.
- iv. To produce an objective appraisal of the role of ADR.
- v. To assess the potential contribution of ADR in the dispute resolution process of the construction industry.

1.3 The theory and development of hypotheses.

The phenomenon which this research is investigating, is the development of ADR in the UK construction industry. This phenomenon manifests itself in a variety of ways:⁶ There is a proliferation of promotional construction literature. Commercial groups advertise the provision of ADR. Government is showing an interest in the form of reports and recommendations for the development of ADR. There has been a major review of the construction industry, which considered the deficiencies and problems with the formal systems of dispute resolution.⁷ There has been a review of the Civil Justice System, which resulted in far ranging recommendations for improvement.⁸ A new Arbitration Act has been implemented in response to on-going problems and criticisms with the procedure.⁹ Finally, the courts and the legal profession are becoming involved in the promotion of ADR. Chapter 2 describes these phenomena and constructs hypotheses to

⁶ See chapter 2 generally.

⁷ Latham M. (1994) op cit See also chapter 2 para. 4.2

⁸ Lord Woolf Final Report (1996) op cit See also chapter 2 paras. 3.11-3.14

⁹ See chapter 2 para. 3.2-3.3

test them.

An early investigation of the literature indicates that there is considerable dissatisfaction with the formal systems and, therefore, one objective of the research is to discover the level of satisfaction that the construction industry has with the formal systems of litigation and arbitration. The literature review indicated also that negative attitudes about ADR are being constructed in the construction industry and it is, therefore, an objective of the research to investigate whether members of the construction industry hold negative perceptions about ADR and whether these affect the choice of ADR as a dispute resolution procedure. Another facet of the phenomenon of ADR in the construction industry is the interest and involvement of the legal profession in the newly developing procedures. The literature indicates that legal advisors to the construction industry may hold a pivotal role in conflict management.¹⁰ One objective of the research is to assess the extent of the influence of legal advisors in the dispute resolution process.

1.4 Hypotheses.

The following hypotheses are tested by the research.

- i. The development of ADR in the construction industry is due to dissatisfaction with the formal systems of dispute resolution.
- ii. The members of the construction industry hold negative perceptions of ADR.
- iii. Negative perceptions are hindering the development of ADR in the Construction Industry.
- iv. Legal advisors in the construction industry are influencing the development of ADR.

The first hypothesis of the research is that the development and interest in ADR is caused

¹⁰ Chapter 2 para.7

by the dissatisfaction of the construction industry with the formal systems of litigation and arbitration. When new systems of dispute resolution are introduced, they have eventually been assimilated into the formal system through a process of legalism and formalism.¹¹ The development of ADR may be hindered by legalism and formalism, which will negate its contribution to the construction industry. This will take the form of increasing attention by the courts and government, in the form of statutory and court control. The research will investigate the involvement of the courts and government in the development of ADR.

One hypothesis of the research is that members of the construction industry hold negative attitudes. It is hypothesised that negative perceptions will hinder the potential development of ADR by affecting the choice of ADR in the dispute resolution process. If negative perceptions are held by members of the construction industry, they may result in either; ADR not being used, the traditional procedures remaining as the preferred method of dispute resolution or, the choice of ADR being limited or confined to particular categories of construction disputes, which are defined by character or financial size.

The fourth hypothesis of the thesis is that the legal profession will influence the development of ADR. When resolving disputes parties are said sometimes to "*bargain in the shadow of the law*".¹² Decisions on settlement and choice of dispute resolution procedures are often made with reference to the probable outcome of going to court or to an arbitration. These decisions are likely to be made with reference to the advice of the legal advisor. Thus, legal advisors are likely to be instrumental in furthering or preventing the development of ADR. Therefore, it is necessary to investigate the factors which influence the construction legal advisors' recommendations on the dispute resolution process.

¹¹ Chapter 2 paras. 1-1.3

¹² Mnookin R. and Kornhauser L. (1979) *op cit*

2 CHOICE OF RESEARCH METHODOLOGY

2.1 Quantitative and qualitative research.

The debate between quantitative and qualitative methods of research¹³ has led, perhaps, to a practical approach being adopted by many social science researchers, that of a multimethod approach,¹⁴ which incorporates both. This approach aims to overcome the weaknesses inherent in adopting either a purely quantitative or qualitative approach.

Quantitative methods of research include social surveys and experimental investigation, whereas qualitative methods often involve participant observation and unstructured in-depth interviewing. The debate is centred around the weaknesses of the qualitative methods to emulate scientific methods of measurement compared to the quantitative techniques. Conversely, the scientific approach of quantitative methods is criticised for failing to take into account the differences between people and is compared unfavourably with the qualitative approaches, which are more reflective of these differences, enable the researchers to get closer to the people they are studying and to use the correct conceptual framework.¹⁵

2.2 Multimethod research design

The argument for the multimethod approach is that by combining the different approaches researchers are able to achieve more confidence in their findings.¹⁶ A strategy was employed which came to be known as **triangulation of measurement**. More than one method of investigation and type of data is employed when researching the same research problem. If the researcher, by using different measurement instruments, is able to produce consistent results, the validity of the research is enhanced.

Brewer and Hunter explain the strategy of a multimethod approach;

¹³ For a comprehensive analysis of the debate see Bryman A. (1988) op cit

¹⁴ Brewer J. and Hunter A. (1989) Multimethod Research Sage: London

¹⁵ Bryman A. (1988) op cit

¹⁶ Webb E.J. et al (1966) Unobtrusive Measures: Normative Research in the Social Sciences Rand McNally: Chicago cited in Bryman A. (1988) op cit

*"Its fundamental strategy is to attack a research problem with an arsenal of methods that have non-overlapping weaknesses in addition to their complementary strengths."*¹⁷

In order to achieve the aims and objectives of the thesis, it is necessary to use a combination of quantitative and qualitative methods. Brewer and Hunter suggest that using a multimethod approach provides triangulation of measurement. The research strategy adopted is akin to the grounded theory.¹⁸ It is not suggested that this has been achieved in its purest sense. The basis of grounded theory is that theory is developed out of the data. Theories are continually refined and tested in the on-going research process. If necessary by re-testing in the field. The final theory is evolved at the end of the data collection and analysis.

3 LITERATURE SEARCH

The first stage of the methodology was to undertake an extensive literature search. The aim of this was fourfold;

- i. To produce a critical review of what had been written on ADR both in the construction industry and more generally. More specifically, it was to identify the mechanisms of dispute resolution and make an analysis of their operation within the industry.
- ii. To make a separate study of arbitration,¹⁹ which has been described as an early example of ADR, in that it was developed to provide an alternative to the formal system of litigation. The objective is to assess the reasons behind the development of arbitration, which is now formalised by statutory intervention and

¹⁷ Brewer J. and Hunter A. (1989) op cit

¹⁸ Glaser B. and Strauss A.L. (1994) The Discovery of the Grounded Theory Aldine: Chicago cited in Bryman A. and Burgess R. (1994) Analysing Qualitative Data Routledge: London and Bryman A. (1988) op cit.

¹⁹ Arbitration is one of the preferred methods of dispute resolution in the construction industry. See beginning paragraph of chapter 2 and chapter 2 para. 2.1

conforms to a legalistic approach.

- iii. To identify the perceptions and attitudes developing in the *construction industry* towards ADR.
- iv. To develop the first phase of the research process, a theory for the phenomenon of the development of ADR.
- v. To develop the research design and methodology further.

It was necessary to undertake an interdisciplinary literature review, which incorporated those disciplines involved in construction; civil engineering, building, surveying, architecture, business and construction management. Further, an extensive review was undertaken of the law literature.

The literature review encompassed other countries and their experiences with dispute resolution. Many countries are now experimenting with ADR. A review of the literature suggests that other cultures exhibit less open conflict.²⁰ The "*Chinese mentality*" it has been suggested is based on "*keeping and saving face*"²¹ and a reluctance to bring dispute into an open forum. A similar feature has been identified in the Japanese construction industry, which results in less incidence of dispute and conflict.²² In view of the different culture of disputes experienced in these countries it was decided not to focus extensively on them.²³

²⁰ Lavers A. (1992) op cit. The writer reviews the contributors to of the UMIST Construction Management Conference and the difference that culture has on conflict in the construction industry. See also chapter 2 para. 1.1

²¹ Koh K.C. (1981) Arbitration for the construction industry: The Singapore Scene Proceeding of the Joint Conference of the Singapore Institute of Arbitrator/Chartered Institute of Arbitrator. Cited by Lavers A. (1992) op cit.

²² Fellows R. (1992) op cit

²³ See chapter 1 para. 1.1

It was decided to concentrate on the literature in the United States (US) as well as the UK.²⁴ This is justified on a number of grounds. The cultural background of the US is similar to the United Kingdom (UK). Its procurement and professional organisation resembles the UK. Both countries operate the same legal system. Another feature of the US was that it had comparable perceptions to the UK of increasing problems with litigation and arbitration, which has led to the US construction industry being further along the experiential road with ADR.²⁵ Most importantly there has been a major investigation by Stipanowich and Henderson²⁶ into mediation and mini-trials in the US construction industry. They had identified, in the US construction literature, negative perceptions about ADR. It, therefore, seemed appropriate in view of the experience of the US with ADR to extend the literature review to the US. An assessment of the potential contribution of ADR to the dispute resolution needs of the UK construction industry could be assisted by reviewing the experiences of the US construction industry.²⁷ A final consideration was the financial constraints on the literature search, as only a limited number of international inter-library loans were sanctioned,²⁸ although it was not felt that a significant number of relevant sources was lost because of this restriction. Where access was gained to other better resourced libraries and data bases, the literature from other countries is reviewed and is commented on in the thesis.

4 INDICATOR EXERCISE

Due to the large and disparate nature of the construction industry, one of the first research problems which had to be overcome was the necessity to narrow the research. It would have been impossible to survey the whole of the industry. Further, the construction industry is not an homogeneous group and this produces conflicting interests and problems from many sectors of the industry. For example, the professionals in the industry, the

²⁴ See chapter 1 para. 1.1

²⁵ See chapter 2 paras. 1.3 and 4.1-4.1.2

²⁶ Stipanowich T. and Henderson D. (1992) *op cit*

²⁷ Brooker P. and Lavers A. (1994) *op cit*

²⁸ 10 in number

architects, surveyors and engineers, may have a very different agenda and interests from the employers or the insurers of the industry. Each sector of the industry could have justified a separate study.

It was decided to limit the research to that area of the construction industry where dispute is perceived to be most prevalent. In order to identify this area an **indicator exercise** was undertaken. (Hereinafter called "Indicator interviews" or "Indicator Exercise".) This exercise took the form of a series of in-depth interviews with identified representatives of the various sectors of the construction industry.

4.1 Objectives of indicator exercise.

The objectives of the indicator exercise were fourfold:

- i. To identify one or more possible axes of dispute within the construction industry.
- ii. To provide further data on the perceptions of dispute resolution and ADR held by members of the construction industry.
- iii. To build up an "*item pool*" ²⁹ of attitudes and opinions which could be tested further in the field.
- iv. To refine the objectives and the hypothesis of the research and develop the theory.

4.1.1 Selection of indicator interviewees

The interviewees were selected, initially, by using contacts of my research supervisors, who provided names of people who are recognized as being affiliated to various professional bodies and organisations. These contacts were informed as to the nature of the research and asked to consent to an interview, which would last about 40 minutes, or to identify another person from their organisation, who would be prepared to assist in the

²⁹ Oppenheim A.N. (1996) op cit

research.³⁰ Thus, the sampling was done with a "purposive" and "snowballing"³¹ strategy.

4.1.2 Methodology of indicator interviews

The interviews took the form of **guided depth interviews**. They were exploratory in nature. The objective was to develop ideas and hypotheses.³² A semi-structured approach was used. As one of the objectives of the indicator interview was to ascertain where disputes are perceived to be most prevalent in the construction industry, this question was put to every interviewee.

The eliciting of attitudes and perceptions about ADR took an unstructured, non-directive approach,³³ in order to avoid interviewer bias and to gain as much detail as possible on the perceptions, attitudes and experiences of the interviewee. When necessary, a more directive probe was used.

Two interviewees requested an interview schedule, which was provided.³⁴ One of the initial contacts sent this schedule to two other members of his institution (Royal Institute of British Architects), one who was willing to participate in an interview and one who sent a written response to the schedule questions. Two contacts were prepared to give telephone interviews only. This type of interview was less satisfactory, as it was difficult to probe areas of interest and to write notes. The interviewee is unable to see the speed that the interviewer is writing and, therefore, no allowances are made. The interviews were not taped, as it was hoped that this would be less inhibiting. However, following the writing up of the interviews, it was felt that much of the rich, illustrative content was lost. As follow-up interviews were planned after the postal survey, it was decided to

³⁰ See appendix 2

³¹ Oppenheim A.N. (1996) op cit

³² Oppenheim A. N. (1996) op cit

³³ Oppenheim A. N. (1996) op cit

³⁴ See appendix 2

experiment with a tape recorder, to ascertain if this would prejudice the quality of interview.

4.1.3 Content analysis of the indicator interviews

The methodology employed for the content analysis was broadly similar to the "grounded theory" as identified previously.³⁵ The objective of grounded theory is for the researcher to conduct an "interplay" between the data and the hypotheses. The researcher is required to make theoretical considerations of the developing themes.³⁶

The method³⁷ applied was to use grounded theory of "*initial coding*", whereby broad categories and themes were developed from the transcripts of the interviews. Where necessary, sub-categories were identified. Once this was completed, "*axial coding*" was applied, which involves taking the data apart and putting it back in new ways, in order to make correlations between the different categories.

Having constructed categories and sub-categories from the data, these were compared to the original hypotheses. The aim of this exercise was to ascertain the adequacy of the hypotheses and to revise them where necessary.³⁸ The correlations produced from the data were then re-tested in the next stage of the research design: the postal survey. Further, the interview data provided the basis for the "item pool" of attitudes which formed the basis of the questionnaire.

4.1.4 Findings of the Indicator Exercise

The interviews indicated that the contractual relationship between main contractor and sub/specialist contractor was the most likely interface to produce disputes. This is, perhaps, not unusual in view of the number and complexity of contracts involved in each

³⁵ See chapter 3 para. 2.2

³⁶ Bryman A. and Burgess R. (1994) op cit

³⁷ See Bryman A. and Burgess R. (1994) op cit

³⁸ Chapter 3 para. 2.2

construction project. As a result of this finding, a number of changes were made to the objectives of the research.

4.2 REVISION OF OBJECTIVES

4.2.1 Revision of objective one.

- i. To investigate the perceptions of key personnel and the professions involved in the construction industry towards dispute resolution procedures in order to provide evidence about the factors and perceptions concerning the choice of ADR as a dispute resolution process.

This objective was investigated in the literature search and the indicator exercise, which had encompassed a broad representation of the personnel involved in the construction industry. At the beginning of the research, it was necessary to consider all the dispute resolution procedures in the construction industry, included litigation and arbitration. However, as the aim of the thesis is an investigation into the factors which impact upon the choice of ADR within the construction industry, the remainder of the research concentrates on ADR rather than dispute resolution procedures generally.

At the same time as the early part of the research, there was a major government review of the construction industry.³⁹ This culminated in the Latham Report,⁴⁰ which gave its response to the criticisms expressed about litigation and arbitration in chapter 9. Both the interim report and the final report consider the factors which are influencing the choice of litigation and arbitration. This, together with the evidence from the literature search and the indicator exercise, meant that the factors influencing the choice of litigation and arbitration⁴¹ have been investigated comprehensively elsewhere.

Further, it is not feasible to investigate the factors which influence the choice of arbitration and litigation in detail, as this would dilute the study. The postal questionnaire

³⁹ Latham M. (1993) op cit

⁴⁰ Latham M. (1994) op cit

⁴¹ Hoare D.J. et al (1992) op cit

would have become unwieldy and overly long, which may have affected the response rate adversely.

In view of the above justifications, the remainder of the thesis concentrates on ADR and the subjects of the research is confined to main contractors and sub/specialist contractors.

Accordingly, objective one is revised to:

- i. To investigate the perceptions of main contractor and sub/specialist contractor involved in the construction industry towards dispute resolution procedures, in order to provide evidence about the factors and perceptions concerning the choice of ADR as a dispute resolution process.

4.2.2 Revision of objective two.

- ii. To investigate the factors that influence the choice of ADR as a dispute resolution process within the construction industry.

This objective was revised in the light of the above justification to be:

- ii. To investigate the factors and perceptions that influence the choice of ADR by contractors and sub/specialist contractors.

4.2.3 Revision of objective three.

3. To investigate the perception of key personnel in construction towards the involvement of each other in the dispute resolution process.

The literature in the construction industry indicates that there are negative attitudes not only towards the dispute resolution procedures⁴² but also towards personnel involved in

⁴² See Building (1992) numbers 37 and 38 September

dispute resolution and there is a general concern about the role of the legal profession.⁴³ The literature suggests that many members of the different professions in construction have a poor opinion of each other and this is instrumental in producing a "mind-set" against each other, which is aggravated and engendered by an adversarial approach.⁴⁴

This knowledge from the literature search had led to the formulation of the third objective, as stated above and was investigated further through the literature and the indicator interviews. The consultation process leading to the Latham Interim Report,⁴⁵ reveals and condemns the adversarial nature of the construction industry and specifically the problems between contractors and sub/specialist contractors⁴⁶ and the indicator interviewees provided further evidence on this issue.

Following the narrowing of the research to the main contractor and sub/specialist contractor, objective three is revised to be:

- iii. To investigate the perception of contractors, sub-contractors and members of the legal profession⁴⁷ towards the involvement of each other in the dispute resolution process.

4.2.4 New objectives of the research.

The indicator interviews and the literature search indicated that there is considerable dissatisfaction with the involvement of the legal profession in the dispute resolution

⁴³ See Chapter 2 paras. 3.1.2 and 3.2.2. Some examples; Bingham T. (1992) op cit. Try H. (1988) op cit, Latham M. (1993) op cit

⁴⁴ Latham M. (1993) Interim Report op cit
Latham M. (1994) Final Report op cit

⁴⁵ Latham M. (1994) op cit

⁴⁶ Latham M. (1993) op cit para. 16(4) See chapter 2 paras. 4.2-4.2.3

⁴⁷ See below chapter 3 para. 4.2.4 **New objectives** which explains the inclusion of legal advisors into objective three.

process and there are concerns that legal advisors manipulate litigation and arbitration.⁴⁸ The implication made in the interviews is that the formal procedures are used as levers for negotiation. Due to the expense and time involved in both procedures, the threat of either can be exploited tactically in the following ways. First, by threatening to use these procedures, in order that the other party is forced to make a disadvantageous settlement. Second, by creating delay in settlement by instigating the initial procedures of litigation and arbitration. Third, by using these procedures to increase the costs of reaching a settlement, which is to the advantage of the legal advisors.⁴⁹ Finally, it was suggested that the legal profession can manipulate ADR by using it to create a delay in settlement.⁵⁰ This view of the manipulation of the disputes resolution process was substantiated by research undertaken by Hoare et al, to elicit consumer reaction to arbitration in construction, which reported that there is widespread use of "gamesmanship" to influence other parties in the dispute and an *"incredible lack of trust"* between the parties to construction dispute.⁵¹

A similar disillusionment was expressed in the indicator interviews and the literature about the litigation procedure. A survey of 400 of the top construction companies undertaken by the City law firm Herbert Smith⁵² reports that 70% of the respondent are of the opinion that the whole system takes too long and almost 40% perceive that the costs of litigation are too high. A spokesperson for the British Property Federation (BPF) asserted, in the indicator interviews, that he would never recommend litigation as a method of

⁴⁸ Chapter 2 para. 4.2.1

⁴⁹ See chapter 2 para. 3.2.1 Where the representative of FASS (Federation of Association of Specialist and Sub-contractors) reported the concern of specialist contractors about the manipulation of arbitration by main contractors and their legal advisors.

⁵⁰ See chapter 2 para. 3.2.1

⁵¹ Hoare D. J. et al (1992) op cit

⁵² Cited in Newman P. (1996) Construction Litigation Tactics CLT Professional Publishing: Birmingham.

dispute resolution; *"It is unsatisfactory whether you win or lose."*⁵³

It was implied by some of the interviewees that lawyers have a vested interest in not settling disputes. One representative of the construction insurance industry estimated that two-thirds of the cost of any dispute is the legal costs. Both the interviewees and the literature suggest that many legal firms are now marketing ADR as a method of improving their profile and poor images.⁵⁴ One professional arbitrator and conciliator who was interviewed claimed;

"Lawyers are determined to keep their hands on ADR.there will be huge redundancies if ADR catches on and lawyers are pushed to one side. Every one of the big legal practices have some sort of brochure saying they have ADR."

Yet the perception of many of the interviewees in the indicator exercise is that the legal profession may not have a committed interest in the advancement of ADR and that lawyers give *"lip service"* to ADR.⁵⁵ Frequent comments were made to the effect that ADR would be manipulated by the lawyers. As one interviewee stated:

"An unscrupulous lawyer could soon develop techniques for winning at ADR. For example mini-trials.....just put up half truths. You have to reveal the whole truth and analyse the whole truth to show falsehood. American lawyers and English lawyers are developing techniques that leave lay observers of mini-trials very convinced of a case which is rotten at the core."

In view of the data produced by the indicator interviews and the literature reviewed, a qualitative examination of the legal advisors to the construction industry was devised and new objectives made:

⁵³ See chapter 2 para. 3.1.1

⁵⁴ See chapter 2 para. 7

⁵⁵ See chapter 2 para. 7 A construction solicitor who was interviewed suggested that many legal firms are giving "lip service" to ADR.

- iv. To investigate the perceptions that construction legal advisors⁵⁶ have towards ADR.
- v. To investigate the factors which influence the construction legal advisors' recommendations of ADR as a dispute resolution process.

4.2.5 Objective six

- vi. To assess the potential contribution of ADR in the dispute resolution process of the construction industry.

This objective is revised to:

- vi. To assess the potential contribution of ADR in the dispute resolution process between main contractors and sub/specialist contractors.

4.3 SUMMARY OF REVISIONS OF RESEARCH HYPOTHESES

Following the completion of the literature search and the indicator interviews, the hypotheses are revised as follows:

4.3.1 Hypothesis one

- i. The development of ADR in the construction industry is due to dissatisfaction with the formal systems of dispute resolution.

This hypothesis is revised to:

- i. The development of the use of ADR between main contractor and sub/specialist contractor is due to dissatisfaction with the formal systems of dispute resolution.

⁵⁶ The objective was not limited to the legal profession (ie solicitor and barristers) but to claims consultants, who are often used by the construction industry for advice in resolution of disputes. See Latham Report (1993) op cit, para 8, which discusses the development: "A new profession of 'Claims Consultants' has arisen."

4.3.2 Hypothesis two

- ii. Members of the construction hold negative perceptions of ADR.

This hypothesis is revised to:

- ii. Main contractors and sub/specialist contractors hold negative perceptions of ADR.

4.3.3 Hypothesis three

- iii. Negative perceptions of ADR influence the choice of dispute resolution process.

This hypothesis is revised to:

- iii. Negative perceptions of ADR held by main contractor and sub/specialist contractors influence the choice of ADR as a dispute resolution process.

4.3.4 Hypothesis four

- iv. Legal advisors are influencing the development of ADR.

This hypothesis remains the same.

5 POSTAL SURVEY OF MAIN CONTRACTORS AND SUB/SPECIALIST CONTRACTORS

A quantitative postal survey was designed. Its objectives were:

- i. To provide data on the perceptions which influence the choice of ADR as a dispute resolution process.
- ii. To confirm or reject the formulated research hypotheses.

5.1 Methodology

The chosen methodology to attain the above objectives was a postal questionnaire, of main contractors and sub/specialist contractor. A postal questionnaire was selected, as it is one of the most effective methods for collecting large amounts of data from a large

sample, which can then be used for statistical inference.⁵⁷ Standardised, face to face interviews were rejected as a method of collecting data, because they are costly to administer and result in a small sample frame.

5.2 SURVEY DESIGN

5.2.1 Survey Population

The survey was to target main contractors and sub/specialist contractors and was therefore to be a comparative design. One concern was that, even within these two sub-sets, there are considerable differences in sizes of organisation. No accurate figures could be obtained for the numbers of organisations involved in construction. There are 199,734 organisations registered for VAT under 'construction'.⁵⁸ These organisations include business operations ranging from small contracting firms involved in the home improvement sector to multi-national organisations with an annual turnover of over £3000billion.⁵⁹

The intention of the research was to assess the sector of the construction industry which involved medium to large organisations. After discussions with the representative associations of both main contractors and sub/specialist contractors, it was decided to confine the survey to those organisations which had an annual turnover of over £250,000 for specialist and sub-contractors and over £500,000 for main contractors. It was judged that this figure would eliminate the very small contracting firms which are involved in the home improvement sector and the so called 'one man and his wheelbarrow'. It was also considered that this figure would incorporate the small but influential specialist contractors who may have been lost if too high a level of annual turnover were selected.

A further difficulty in defining the survey population was that there could be considerable

⁵⁷ See Oppenheim A. N. (1996) op cit for a comprehensive comparison of postal survey versus standardised interviewing.

⁵⁸ Business Monitor (1994) PA1003 (HMSO)

⁵⁹ BICC was recorded as the largest British Contractor in the UK in the Building 500 1994 list. In 1993 the company's turnover was 3,894 (£mill)

disparity between members of each sub-section. For example, sub/specialist-contractors can range from very small organisations to extremely large operations, which could be comparable with the largest main contractors. Therefore there would be no guarantee that the responses to the questionnaire were comparing like with like. It was decided to categorise contractors by size of turnover. Thus each respondent was asked to give an approximation of their organisation's annual turnover.⁶⁰ Using this design, the selection would be by "stratified random sample." Thus, it would be possible to compare responses of "turnover size" as well as "contractor type".

5.2.2 Sample frame

Despite a comprehensive search to find convenient listings for all main contractors and sub-contractors who fitted the defined population, none was found. Companies House could provide lists under different trade descriptions. They cost £200 for the first 1000 companies and £10 for each additional 1000. This option was discounted for two reasons: First, the financial constraints of the research meant that this was not a practical option. Second, other organisational forms, such as partnerships, would not have been included.

The solution to this problem was a pragmatic one. A list of all the representative associations for both the main contractors and sub-contractors was drawn up,⁶¹ with the intention of drawing the sample randomly from the membership lists provided. Using the membership lists of the official associations had a further advantage, in that their support was elicited and this was to be used in order to encourage a better response rate.

After further consultation with the representative organisations of the main contractors, it was evident that many main contractors are probably not represented by any particular association. Therefore, these lists were supplemented by using two other sources:

1. The 1994 Contractors file,⁶² which lists companies who responded to a survey who

⁶⁰ See appendix 1. Questionnaires

⁶¹ See appendix 1 for the final list of organisation which assisted in the research.

⁶² NCE Contractors File 1994

had an annual turnover of £20 million per annum.

2. A list from Building, which gives the top 500 construction companies in Europe.⁶³

There are unforeseen problems in this design, in that some associations have very small membership numbers. For example, the MACEF (Mastic Asphalt Council & Employers Federation Ltd) has a membership list of only 38,⁶⁴ whereas the ECA (Electrical Contractors' Association) has a membership of over 2000.⁶⁵ In order to canvass as many different sub/specialist contracting groups as possible, an equal number of each sub group (where possible)⁶⁶ were selected randomly.

A further problem was how to ensure all the sample have an annual turnover of over £250,000 for sub/specialist contractors and over £500,000 for main contractors. Some associations have members who do not fit into these categories and the membership lists themselves did not always indicate the size of turnover. Where this information was not explicitly given on the membership lists, the associations indicated those organisations which, in their opinion, were large enough to be included in the survey. (Or too small to be included.) When the questionnaires were coded, all the correspondents fitted into the required category of having a turnover of over £250,000, except for one which had a turnover of £200,000.

Two associations⁶⁷ were unable to provide their membership lists, because to do so would breach confidentiality to their members. However, they agreed to issue the questionnaires themselves. Questionnaires were sent in stamped envelopes with instructions

⁶³ Building 500, 2 December 1994. Only English and Welsh companies were selected from the list.

⁶⁴ MACEF Membership list

⁶⁵ ECA Register of Members Issue no. 9

⁶⁶ Some associations had fewer members than the number designated for each sub group.

⁶⁷ National Master Tile Fixer
National Federation of Roofing Contractors'

to send out randomly to their members. One association refused to participate in any form whatsoever.⁶⁸ The Contract Flooring Association were unable to assist because their membership list did not categorize the members into size of turnover and it would have been impossible to know if the wrong size of operation was being surveyed. Any conclusions drawn about main contractors or sub/specialist contractors are made taking these factors into consideration.

5.2.2.1 Profile of respondents.

When the survey was completed the final number of respondents was 229. This consisted of 124 main contractors and 105 sub/specialist contractors. Contractors had been selected by using their representative organisations but some had been selected from other convenience lists, such as the Contractors File.⁶⁹ To ensure that contractors were categorized correctly into main contractor or sub/specialist type, each questionnaire had a space provided, where the respondent was requested, for the purposes of classification, to describe the main activities of their organisation. As a result of this question, one respondent, who had been on the main contractor lists, was reclassified as a specialist contractor.

In order that comparisons could be made for differences between responses for organisations with different sizes, the respondents were categorised further into three turnover categories, which represented large, medium and small organisations. A search for an official categorisation of construction organisations by turnover size was undertaken, but this was unsuccessful. Following telephone inquiries, the following information was determined: The Department of Environment (DOE) and the Office for National Statistics⁷⁰ (ONS) classify by size of employment. The Department of Trade and Industry (DTI) categorise organisations using a combination of factors, of which turnover is only one element. The European Commission has a group called The Construction

⁶⁸ Glass and Glazing Federation (GGF). Their members were complaining about the number of questionnaires that they were being sent.

⁶⁹ Chapter 3 para. 5.2.2

⁷⁰ The source of statistics for the ONS is the DOE.

Market and Intelligence Division,⁷¹ which produces monthly figures based on three categories of turnover size but the smallest category incorporates a monthly turnover of £50,000, which is an annual turnover of approximately £600,000.⁷² The survey had targeted organisations with a turnover of over £500,000 for main contractors and over £250,000 for sub/specialist contractors, it was, therefore, decided that this categorisation was not appropriate. In 1994, the Business Monitor introduced 'The Inter-Departmental Business Register (IDBR), which registers VAT-registered legal units. The Register for Construction uses 10 bands, of which the largest is organisations with a turnover of over £10 million. There are 870 organisations in this band, which is reported as 0% of the industry. As the survey was targeting large construction organisations, the 10 bands were not practical. The investigation had revealed that the official bodies which monitor the construction industry have no uniform categorisation for size construction operations by turnover size. Each body measures the size of the construction industry using different criteria. Finally, a pragmatic decision was taken and the categories were based on an analysis of the respondents' reported turnover sizes.

An inspection of the line chart in figure 1 shows that there is a peak of organisation with a turnover size of £6 million. It was, therefore, decided to make the smallest turnover category those organisations with a turnover of £6 million and under. There are two further peaks between £24 - £55 million. The second category includes organisations with a turnover of over £6 million and under £50 million. The largest category, therefore, comprises organisations with a turnover of £50 million and over.

⁷¹ This is one of the divisions producing statistics for the DOE

⁷² Large organisation: £2.5million monthly turnover, which is approximately £30 million annually. Medium organisation: £51,000 - £2.5million a month, which is approximately £600,000 to £2.5million annually. Small organisation: up to £50,000 per month, which is approximately up to £600,000 annually.

Figure 1 Line chart of the reported turnover for the respondents.

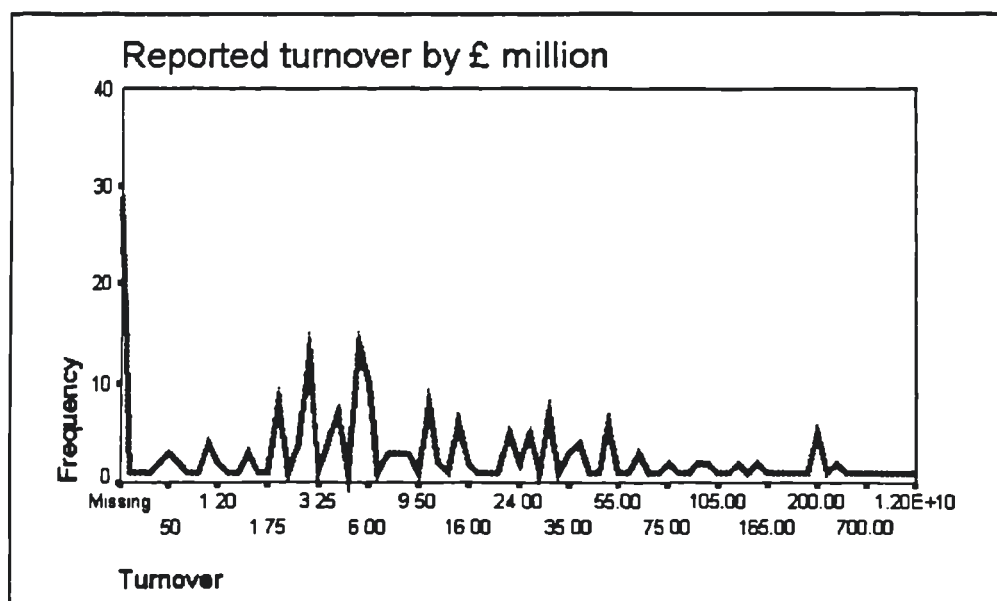


Figure 2: Cross-tabulation showing the frequency and percentage of "contractor type" by "turnover size"

Frequency and %	£6 million and under	Under £50 million	£50 million and over	Row Total
M a i n contractor	36 18%	32 16%	39 19.5%	107
Sub/specialist contractor	54 27%	29 14.5%	10 5%	93
Column total	90 45%	61 30.5%	49 24.5%	200 100%

Cross-tabulation of frequency and percentage of "contractor type" by "turnover size".

In order to assess the number of main contractors and sub/specialist contractors which fitted into each size of turnover, a cross-tabulation was drawn. (See figure 2) The smallest category is sub/specialist contractors with a turnover of £50 million and over, which has only 10 in this cell. However, there are sufficient numbers in each cell to perform chi-square statistics.

5.2.2.2 Conclusions on the sample frame

In consideration of the above discussion on the sample frame, the data produced from the postal survey are from a restricted, informed sample which was selected randomly from a designated population of the construction industry. It is representative of the chosen population.

5.2.3 Selecting the sample

Once the lists were compiled, a systematic stratified sampling strategy was employed.⁷³

5.2.3.1 Sample size

It has been suggested that the overall size of the population is not the only relevant factor in deciding the size of the sample.⁷⁴ Several factors had to be taken into consideration. First, the size of sample was limited by financial constraints. Second, for the statistical analysis of the data that was intended, there was a necessity for approximately 100 main contractors and 100 sub/specialist contractors responses,⁷⁵ to reach this with the estimated 40% response rate, which it was hoped to achieve, a sample of 500 was needed. Third, one way of assessing the sample size is to ensure that it is theoretically possible to fill each cell in an analytical table with 5 cases.⁷⁶ Applying this to a statement using the Likert five point scale and three categories of size of organisation, (large, medium and small), this would require a minimum of 75 cases. Adding another variable, such as main contractor and sub-contractor, doubles the number of cases required to 150. Finally, if factor analysis is part of the design, the reliability of results are *dependent on sample size*.⁷⁷ There should be more subjects than variables and not fewer than 100 individuals

⁷³ Fowler F. J. (1993) Survey Research Methods Sage: London

⁷⁴ Fowler F.J. (1993) *ibid*, De Vaus D. A. (1996) *op cit*

⁷⁵ This number was decided on after discussion with my supervisors and other researchers and statisticians in the university.

⁷⁶ Bouma G.D. and Atkinson G.B.J. (1995) *op cit*
Wright S. R. (1979). Quantitative Methods and Statistics Sage:London.

⁷⁷ Bryman A. and Cramer D. (1992) *op cit*

per analysis.⁷⁸ De Vaus⁷⁹ suggests that, as a rule of thumb, it is best to ensure that the smallest group has at least 50-100 cases.

In consideration of the above arguments, it was decided that at least 100 respondents from each category of main contractor and sub-contractor would be required. An approximate response rate of 40% was anticipated; this necessitated a sample size of 500.

5.3 Constructing the questionnaire

The questionnaires were designed after taking into account the literature on the subject⁸⁰ and using the data from the content analysis of the indicator interviews. Attention was paid to the basic rules;⁸¹ thus care was taken with question wording. Each question was kept as short as possible and possible ambiguity was checked, double-barrelled questions, leading questions and double negatives were avoided. Where applicable, "don't know" categories were supplied.

One objective of the questionnaires was to test the opinions and attitudes⁸² of contractors towards ADR. Careful consideration was taken to build up an "item pool"⁸³ of attitude statements, which had been culled from the literature and the indicator interviews. For Oppenheim,⁸⁴ the depth interview is essential to build the "item pool", as it allows the

⁷⁸ Gorsuch R.L.(1983) Factor Analysis Erlbaum: Hillsdale cited in Bryman A. and Cramer D.(1992) op cit

⁷⁹ Hoinville G. et al. (1977) Survey Research Practices Heinemann: London cited in De Vaus (1996) op cit

⁸⁰ Oppenheim A. N. (1996) op cit, Fowler F J. (1993) op cit, De Vaus D. A. (1996) op cit

⁸¹ Oppenheim A. N. (1996) op cit

⁸² See Oppenheim A. N. (1996) op cit for the distinction between opinions and attitudes. Attitudes range from superficial opinions, which may be changed, to more deep-rooted attitudes, those of beliefs, values and even to the deepest level of personality.

⁸³ Oppenheim A. N. (1996) op cit

⁸⁴ Oppenheim A.N. (1996) op cit

researcher to achieve two objectives;

"(1) explore the origins, complexities, and ramifications of the attitude areas in question, in order to decide more precisely what it is we wish to measure (conceptualisation); and (2) get vivid expressions of such attitudes from the respondents, in a form that might make them suitable for use as statements in an attitude scale."

These attitude statements were placed under several headings in the questionnaires.⁸⁵

The Likert five-point scale was adopted, as it is easy to construct, easy to answer, and it is, it has been suggested,⁸⁶ the most relevant scale for exploring theories of attitudes and attitude patterns.

5.3.1 Self completed questionnaires

The survey design was for "self completed questionnaires". This type of approach has particular problems which need to be addressed:⁸⁷

- I. Particular attention has to be given to **questionnaire design**. There are problems with complexity of questions, boring questions and ordering of questions.
- II. There is **no control over who completes the questionnaire**.
- III. They typically have a **poorer response rate** than either face to face interviews or telephone interviews.

⁸⁵ See appendix 1. Questionnaires

⁸⁶ Oppenheim A. N. (1996) op cit, Guttman's method may be preferable for attitude change which I am not investigating. Thurstone procedures are good for studying group differences but it is a very time consuming procedure. Oppenheim states that Likert scales correlate well with the Thurstone scales which thus, makes it the most popular procedure.

⁸⁷ De Vaus D.A. (1996) op cit

5.3.2 Questionnaire design.

In order to minimise the problems caused by questionnaire design, due attention was given to lay out, definitions and instructions. Particular attention was paid to the length of the questionnaire.⁸⁸ Originally, the questionnaire had a section for respondents who had used ADR. This was considered to make it overly long and complex and may have led to a poor response. Further, respondents who had not used ADR may have felt that the survey did not apply to them. Therefore, it was decided to send out two separate questionnaires together. Each one was clearly marked for those who had used ADR and those who had not.⁸⁹

5.3.3 Piloting of questionnaires

Once the questionnaires were designed, they were tested on two separate groups, in order to test their effectiveness.⁹⁰ The aim of the survey was to target managing directors and senior personnel, therefore, both these pilot groups were selected as they contained management-level construction personnel.

A. South Bank University pilot test.

The questionnaire was first tested on a group of students taking a course in Advanced Construction Law at South Bank University. This was part of a full time and part time degree programme leading to a B.Sc(Q.S.), B.Sc (B.S.) or B.Sc (Con Man).

The aim of the first pilot test was to assess how long the questionnaires took to complete, to evaluate how the questions would be interpreted for meaning and, more generally, the

⁸⁸ Strategies for improving the response rate Chapter 3 para. 5.3.5

⁸⁹ See appendix 1. Questionnaires.

⁹⁰ The pilot tests were made possible with the assistance of Paul Bick, formerly senior lecturer in law, South Bank University and Richard Bayfield of Richard Bayfield Associates.

clarity and efficacy of the questionnaire. It was a "declared" pre-test.⁹¹ The respondents were told the questionnaire was a pre-test and the group were questioned about their understanding of the questionnaire and asked to comment on possible rephrasing or clarity of questions. Following the test, certain revisions were undertaken. For example, question 10 was re-designed due to a general lack of understanding by pilot study respondents at South Bank University.

B. Oxford Brookes University pilot test.

The second pilot was again a "declared" test. The test group came from a short, evening course on "Construction Project Management", which was directed at middle and upper management level, and run by the Department of Construction and Earth Sciences at Oxford Brookes University.

The group were informed that it was a pre-test. They were asked to complete the questionnaire and return it in an addressed envelope; making any comments that were relevant as to the layout and wording, stating how long the questionnaire took to complete and making general criticisms.

The first pre-test was more concerned with the general understanding of the questionnaire and the layout. The second pilot group bore a closer resemblance to the people to whom the survey was to be addressed and was, therefore, a better indicator of the final responses which would be collected. One suggestion which was adopted from the replies to the second pilot test was to move the definition page to the front of the questionnaire. Further clarification was made to question 10 and this was tested again for understanding by asking lecturer colleagues how they interpreted the question.

The length of time that it had taken the pilot groups to complete the questionnaire was assessed in order to determine a time for completion. This was then put on the front

⁹¹ Converse J. and Presser S. "Survey Questions: Handcrafting the Standardized Questionnaire", Sage University Paper. Cited in De Vaus D.A. (1996)

page of each questionnaire.

5.3.4 Control over who answers the questionnaire.

The second problem of self completed questionnaires, namely control over who answers it, was minimised by addressing the correspondence to the managing director of each organisation. If the actual name of the managing director was available from the association membership list, this was used. The questionnaire also had a section requiring the respondent to fill in his/her position in the organisation.⁹² Figure 3 shows that 63 % (33.2% + 28.8%) of the respondents were managing directors or directors of their organisations. The reported positions of the remaining respondents suggest that a high number of respondents were in management positions.

Figure 3: Position of respondent in organisation.

Position of respondent	Frequency	%
Managing Director	76	33.2 %
Other type of director	66	28.8 %
Management position ⁹³	33	14.4 %
In house legal team	6	2.6 %
Surveyors ⁹⁴	28	12.2 %
Missing	20	8.7 %

5.3.5 Strategies for improving response rate.

The third problem of self completed questionnaires is that traditionally there can be a poor response rate. In order to maximise the response rate and to minimise the problem of non-response bias,⁹⁵ the representative associations of main contractors and sub/specialist contractors were approached for their support and this was clearly mentioned in an official

⁹² See Appendix 1

⁹³ This included project managers, managers, contracts managers and technical managers.

⁹⁴ This includes surveyors who reported that they were in a management position.

⁹⁵ Non-Response Bias The weak link Chapter 3 paras. 6-6.2

covering letter,⁹⁶ which was sent with the questionnaires. This was personally signed, identified how the respondent had been selected for the survey and assured them of confidentiality. A date for reply was given. The letter also explained the purpose of the survey and the importance of their assistance.⁹⁷

Subsequent to the initial posting, follow-up questionnaires were sent to any non-respondents, with an encouraging letter.⁹⁸ The letters explained that the survey was addressed to both main contractors and sub-contractors and, in order for a balanced view be obtained, their assistance was vital. Finally, a number of telephone calls were made, to ask for assistance and further questionnaires were issued to those who had been contacted and who had indicated that they were willing to complete a questionnaire. At this stage, the sample from sub-contractors was selected, as there was a slightly lower rate of return from these groups.

Other strategies were employed to ensure a better response rate;⁹⁹ for example, the questions were divided into two questionnaires; one for those companies and firms who had used ADR and one for those who had never used it. The length of the questionnaire to be completed was thus shortened. It was anticipated that this would lead to a better response rate.¹⁰⁰

5.3.6 Response rate for postal survey

The final response rate was 46.3% for main contractors and 38.7% for specialists and

⁹⁶ Appendix 1.

⁹⁷ De Vaus D. A. (1996) op cit

⁹⁸ Appendix 1. 177 follow-up questionnaires were sent to contractors from the sub/specialist contractor lists, which gained 29 replies. 181 follow-up questionnaires were sent to contractors from the main contractor lists, which gained 35 further replies. 60 telephone calls were made and 7 new questionnaires were asked for. No replies were received from the telephone calls.

⁹⁹ See Questionnaire design chapter 3 para 5.3.2

¹⁰⁰ Oppenheim D. A. (1996) op cit

sub-contractors. The overall response rate for the survey was 42.5%. Compared to figures reported in other postal surveys for the construction industry,¹⁰¹ it is submitted that the strategies employed to achieve a reasonable response rate were relatively successful and justified.

6 NON-RESPONSES. "the weak link"¹⁰²

One issue which must be addressed in any survey is that of non-responses. It has been suggested that the researcher should treat the survey population as 2 sub-populations or strata, as the lower the response rate, the more danger there is that there will be bias.¹⁰³ Some researchers in the construction industry have reported a poor response rate from mail surveys¹⁰⁴ and Belson¹⁰⁵ comments that a response rate of 30% or less is frequently reported. As the survey design was a stratified sample, one problem which needed to be identified was whether a particular group did not respond and whether this presented a specific bias which needed to be accounted for. Three ways of obtaining information to enable adjustments for bias have been identified by De Vaus.¹⁰⁶ These suggestions were utilised in the consideration of non-response bias: First, to use observable information, second, the use of the sample frame itself to provide information about non-response and third, the known characteristics of the population (if known) can be compared to the sample. If any differences are found, then this would indicate the areas of bias and the extent of the differences indicate the degree of bias. De Vaus advises that, with this information, the adjustments can be made during analysis to neutralise the effect of non-

¹⁰¹ Fenn P. and Gould N. (1994) op cit reported a response rate of less than 10%
Stipanowich T. and O'Neil L.K. (1995) reported a poor response rate for the Forum on the Construction Industry in the USA Construction Lawyer Vol 15 No 4 Nov

¹⁰² Moser K. and Kalton G. (1985) Survey of Methods in Social Investigation Gower 2nd Edition Reprint (1993)

¹⁰³ Ibid

¹⁰⁴ Fenn P. and Gould N. (1994) op cit.
Stipanowich T. and O'Neal (1995) op cit Reported a poor response rate in the USA

¹⁰⁵ Belson W. A. (1986) Validity in Survey Research Gower: Aldershot

¹⁰⁶ De Vaus D. A. (1996) op cit

response bias.

6.1 Non-response research strategy

Four strategies were utilized in order to diminish this problem and, therefore, minimise the possibility of bias:

6.1.1 Strategy one; To endeavour to optimise the response rate.

The strategies employed to achieve a good response rate are discussed above.¹⁰⁷ It is submitted that the overall response rate of 42.5 % reflects the success of the first strategy and that any potential bias of non-response due to survey design was minimised, insofar as that could be achieved.

6.1.2 Strategy two: Analysis of returned unanswered questionnaires.

An analysis of the non-respondents who returned questionnaires uncompleted was undertaken in order to provide information about possible reasons for non-response. 31 (6.2% of the survey) returned the questionnaires without completion. Of these, 7 stated that their organisation had a policy of non-response and 10 either did not have the personnel or the management time to complete the questionnaires. The remaining 24 returned the questionnaires with no comments.

In discussions with the associations which represent the construction industry, several executives discussed the increase of students approaching them for assistance and stated they are now limiting their support. Some respondents both in the interviews and to the questionnaires, indicated they were inundated with questionnaires. It is submitted that issues of management time are a valid factor in the generally low response rate for postal questionnaires in the construction industry and that this would not suggest that there is any particular bias towards the issues of the survey, from those who are non-respondents.¹⁰⁸

¹⁰⁷ Chapter 3 para. 5.3.5

¹⁰⁸ With the increase in dissertation requirements in bachelor degrees and a considerable increase in postgraduate courses this is an issue that higher education may need to address if worthwhile research is to continue. There is a possibility that those people

6.1.3 Strategy three; Analysis of first and second wave of respondents

A comparison was made between the first respondents of the postal survey with those in the second wave as it has been suggested, one way of assessing bias for non-responses is to treat the respondents who reply to the follow-up questionnaires as being more representative of non-respondents than that of the initial respondents.¹⁰⁹ As Moser and Kalton suggest,¹¹⁰ people who are more enthusiastic about a product are more likely to respond than those who are not. Therefore, the third strategy to reduce potential bias was to assess the statistical differences of response between the first and second waves of postal respondents.

6.1.3.1 Statistical Analysis

Once the data had been collected, it was analysed by using multivariate analysis of variance (MANOVA¹¹¹). It was necessary to discover whether the different groups of 'first wave', 'second wave' and 'telephone interviewees' (see below) differed on some variables. A statistical test of difference had to be used and Analysis of Variance was selected as the research design had three independent groups. If multiple ANOVA tests are done with two or more groups and several dependent variables, this leads to the increased probability of finding a significant statistical difference (Type 1 Error).¹¹² As the data comprised a number of independent variables as well as multiple dependent variables, Multivariate Analysis of Variance (MANOVA) was used.

When statistical tests were completed on the categorical data (MANOVA), to compare the responses between the first wave and the second wave, there is no significant difference.

and organisations, whose assistance in research is essential, will be alienated by the volume of demands for responses.

¹⁰⁹ Bartholomew D. J. (1961) Applied Statistics, 10, 52-59. Cited in Moser K. and Kalton G. (1993) op cit

¹¹⁰ Moser K. and Kalton G. (1993) op cit

¹¹¹ Chapter 3 para. 7.5.2

¹¹² Breakwell G. Hammond S. and Fife-Schaw C. (1995) Research Methods in Psychology Sage: London

However, a oneway analysis of variance test on the question, "Would you consider using ADR to resolve a construction dispute?" yields a significant difference at the 0.05 level between the first wave of respondents to the postal survey and the second wave. ($F = 7.43$; $df = 1/198$; $p = 0.007$)

Figure 4: Would you consider using ADR? by "Wave response".

Wave response	Yes	No	Don't Know	Row total
'First wave'	106 75.2 %	5 3.5 %	30 21.3 %	141 70.5 %
'Second wave'	34 57.6 %	1 1.7 %	24 40.7 %	59 29.5 %
Column total	140 70 %	6 3 %	54 27 %	200 100 %

Cross-tabulation of frequency and percentage for the 'first wave' of respondents and the 'second wave' of respondents on the question: Would you consider using ADR to resolve a construction dispute.

An inspection of figure 4 reveals that there is a significant rise in the 'second wave' of respondents who do not know whether they would consider using ADR. Over 40% of the 'second wave' state that they do not know if they would consider using ADR, compared with 21.3% of the 'First Wave'. This result shows that the 'Second Wave' are considerably less confident about ADR and supports the proposition that any non-response may be due to lack of knowledge about ADR rather than any particular bias shown by any group towards ADR.

6.1.4 Strategy four: The telephone interview

A better indicator of whether there is a discernable bias for non-response is to attempt to survey them, to examine their responses. This was accomplished by the fourth strategy, namely the telephone interviews. A telephone survey of some of the non-respondents was undertaken in order to compare the first wave and second wave of the postal survey with those who were non-respondents to assess any possible bias.

The following hypotheses were formulated from the observable information gathered

from the returned but not completed questionnaires and from the third phase of the design to assess non-response bias:

1. Those who had experience of ADR would be more likely to respond to a survey.
2. Those who had some knowledge of ADR are also likely to respond.
3. Those who have not heard of ADR are unlikely to return the questionnaire.

These hypotheses were tested in the fourth strategy.

6.1.4.1 Telephone interview design.

The sample frames for the initial postal survey had been composed from the membership lists of the associations which represented main contractors and sub-contractors. It was, therefore, possible to calculate the response rate of each association, to assess whether any particular group had failed to respond. Having identified those groups which had a poor rate of return, these were then targeted for short telephone interviews. Several sub/specialist contracting groups had particularly poor response rates and, therefore, more telephone calls were made to these groups in order to ascertain whether there was any particular bias present. As the overall response rate for sub/specialist contractors was less than for main contractors (38.7% and 46.3% respectively), it was necessary to concentrate on the former group, in order to establish whether there was any potential bias in this result.

It was felt to be inappropriate to attempt to complete the original postal questionnaire in its entirety, as this would have taken about 15 to 20 minutes and some of the questions would be difficult to ask orally.¹¹³ It was felt that it was important to keep the length of the interview to 6 or 7 minutes in order to accommodate the interviewee and to maximise the response rate. It was, therefore, necessary to select questions from the original questionnaires. In doing so, consideration was given to the following objectives.

¹¹³ See question 10 of both questionnaires Appendix 1.

- i. To target those sections which had the poorest response rate, in order to identify whether there were any recognisable reason or bias for this, which might constitute bias.
- ii. To test the responses on a series of questions in order to establish whether there was any bias due to non-response.

Key questions were chosen which were reflective of the overall research hypotheses. For example, negative perceptions about ADR: using it is a sign of weakness, it reveals too much of the case to the opposition and that its weakness is its non-binding nature. Other questions which had indicated strongly held attitudes were chosen. For example, there is a need to move away from the adversarial approach, the formal systems are too expensive and threatening. These questions also formed the basis of the follow-up interviews with the respondents.¹¹⁴

In order to eradicate the possibility of researcher bias, it was decided to use an interviewer who had no knowledge of the postal interview but who had experience of telephone market research. The interviewer was given a list of non-respondents and the questionnaire which had been designed for the purpose. The interviewer's brief was to request a telephone interview with the managing director. If s/he was not available a list of possible candidates was suggested: contracts director, surveying director, legal director, manager or other senior person. The interviewer was to attempt to identify a person who was in a sufficient position of authority and had sufficient knowledge to complete the survey questions.

Altogether 128 calls were made. 86 were made to sub/specialist contractors and 42 to main contractors. There were 41 successfully completed interviews. Of the other 87 telephone calls, the interviewer was unable to contact anyone in the company who was available to answer the survey. The reasons given were: in a meeting, on site or away from the office.

¹¹⁴ See appendix 1

The 41 completed interviews were made up of 24 sub/specialist and 17 main contractors. 16 interviewees had either never heard of ADR or were insufficiently knowledgeable and thus, were unable to answer the questions concerning ADR. In these cases, a few, very brief questions were asked about the interviewee's views on arbitration, litigation, the adversarial approach to dispute resolution and the involvement of lawyers in resolving disputes.¹¹⁵

12 refused to assist in the survey because they were too busy. The interviewer reported that fewer recalls were needed to reach a person able to help for main contractors than specialist or sub-contractors. Although the numbers of telephone interviews were relatively small and an unequal division was made between main and sub/specialist contractor, it was noticeable, that, when completing the questionnaire, there were only 6 sub/specialist contractors who were able to complete the more extended section of the survey, compared with 10 main contractors. Indeed, one specialist sub-contractor declared that his organisation was about to go through an ADR procedure but once the questions were attempted, stated that he did not have enough knowledge to answer the questionnaire and he was able only to answer the questions for those *who had no* knowledge of ADR. This provides support for the hypothesis that non-response was due to a lack of knowledge about ADR.

6.1.4.2 Analysis of telephone interviews

The data was analysed using multivariate analysis of variance (MANOVA). The test did not yield significant differences between groups of 'first wave', 'second wave' and 'telephone interviewees' on the dependent variables.

The result of oneway analysis of variance (ANOVA) on the question: **Would you consider using ADR to resolve a construction dispute?** is ($F = 4.70$; $df = 2/217$; $p = 0.01$), which indicates that there is a significant difference between the 'first wave' the 'second wave' and the telephone interviewees at the 0.05 level of significance. When the

¹¹⁵ See appendix 1

post hoc Scheffé procedure¹¹⁶ is performed, it indicates that there is a significant difference between the 'first wave' and the 'second wave' of respondents. As discussed above, this suggests that there is uncertainty about using ADR from the second wave of respondents which is explained by a lack of knowledge about ADR. These tests do not indicate that there are any differences between the first wave of respondents and the telephone interviewees.

The experience of the telephone interviews, with so many respondents unable to complete the questionnaire, suggests that there is a considerable body lacking awareness about ADR, in both sectors of main and sub/specialist contractors, with the latter showing less knowledge.

6.2 CONCLUSIONS ON NON-RESPONSES

It is concluded from the analysis undertaken of non-response that there is no bias. Non-response is due to a number of issues; lack of knowledge about ADR, time constraints or policy reasons taken by individual construction companies and the likely possibility that the questionnaire never reached an appropriate individual who was able to complete it.

In view of the experience of the telephone interviews, in particular, the number of interviewees who were unable to answer questions on ADR, it is submitted that the survey is representative of the informed sections of the main contractors and sub-contractors which makes up the construction industry.

7 MEASUREMENT AND ANALYSIS OF SURVEY DATA

7.1 Choice of statistical package

In order to carry out the statistical analysis of the survey data, a computer package had to be selected. SPSS (Statistical Package for the Social Sciences) was chosen as it is one of the most widely used in the Social Sciences, Oxford Brookes University has the licence for the package and experienced technical advisors.

¹¹⁶ Chapter 3 para. 7.5.2

SPSS for Windows Release 6.0.1 was the system that was preferred, as this had the advantage of being simple to use and had a facility for linking and exchanging files between applications. It was thus possible to link SPSS charts and incorporate data and texts into other Windows applications.

7.2 Processing the data.

When all the questionnaires were returned, a file was set up in SPSS and all the variables were defined and given values. The non-numeric data was translated into a coding system. The opinion questions were on a Likert five point scale which ranged from strongly agree to strongly disagree. Each question became a variable with five values, which were as follows: 1 = strongly agree, 2 = agree, 3 = neutral, 4 = disagree and 5 = strongly disagree.

Qualitative variables were given a code. For example: 1 = main contractor and 2 = sub/specialist contractor. Missing observations were given a "missing value".

Once the data had been coded, it was entered on the SPSS computer package.

7.2.1 Preliminary data analysis.¹¹⁷

Before any statistical tests were run on the data, it was examined in order to check for entering errors. As Chatfield and Collins state;

*"Having recorded the data, it is then essential to look for suspect values and errors of various kinds."*¹¹⁸

This check took the form of *"data editing"*.¹¹⁹ A frequency printout was done for each variable in order to check for out of range values. Thus, if a "2" had been coded as

¹¹⁷ Chatfield C. and Collins A. (1992) Introduction to Multivariate Analysis Reprint Chapman and Hall: London

¹¹⁸ *ibid*

¹¹⁹ *ibid*

"22", the error in coding was discovered and corrected.

7.3 Levels of measurement

The attitude statements which are used in the questionnaire, use a Likert scale, which is sometimes strictly interpreted as using an ordinal level of measurement.

*"Any variable in which categories can be ranked but where the difference between the categories cannot be quantified in precise numerical terms is an ordinal variable."*¹²⁰

The strict, traditional view¹²¹ is that ordinal data should not be used for more sophisticated measurement than ranking in order. A less conservative view is that some ordinal data, which lie between ordinal and interval measurement, produce more than just ranking and can yield a *"magnitude of difference"*¹²² in the ranking.¹²³ By adopting a strict view, it is argued that many valuable data are lost.¹²⁴ It has become common practice for social scientists to treat ordinal scales as interval or ratio one.¹²⁵ Thus, Bryman and Cramer describe two types of interval variables; one a "true" one, where the distances between categories are equal, and the other which has a large number of categories, *for example*, the multiple item questionnaire measures.¹²⁶

¹²⁰ De Vaus D.A. (1996) op cit

¹²¹ Henkel R.E. (1975) Part-whole correlations and the treatment of ordinal and quasi-interval data as interval data Pacific Sociological Review. 18: 3-26 Stine W.W.(1989) Meaningful inference: the role of measurement in statistic Psychological Bulletin, 105 Cited in Breakwell G. et al (1995) op cit

¹²² Breakwell G. et al (1995) op cit

¹²³ Minimum E.W. et al (1993) Statistical Reasoning in Psychology and Education New York: John Witney Cited in Breakwell G. et al (1995) op cit

¹²⁴ For a detailed critique of the debate see Nunnally Jun C. (1978) Psychometric Theory McGraw-Hill Series in Psychology: New York

¹²⁵ Cramer D. (1994) Introducing Statistics for the Social and Behavioural Sciences UCL Press: London

¹²⁶ Bryman A. and Cramer D. (1994) op cit

After consultation with statistical experts,¹²⁷ the Likert scale, which has been adopted, is justified as an interval scale because five categories¹²⁸ are used; it is on a continuum and anchored on either side.

7.4 Parametric or non-parametric statistical tests.

Before a decision could be taken on which statistical tests were to be employed, consideration was given to the use of parametric or non-parametric tests. Parametric tests should be used only if the data fulfil three criteria;

- i. The variables are measured with an interval or ratio scale.

and the samples are drawn from populations:

- ii. whose variances are homogeneous and,
- iii. whose distributions are normal.

These three criteria have been repudiated by a number of statisticians. For example: Lord¹²⁹ suggests that parametric tests can also be used with ordinal variables because the application of the test is to numbers and not what the numbers refer to. Most attitude tests are ordinal but, as Bryman and Cramer state,¹³⁰ parametric tests are routinely applied to such variables. They warn that, where the sample size is small, less than 15, it is better to use non-parametric tests.

¹²⁷ Dr R. Lindsay, Principal Lecturer in the Department of Psychology and Dr T. Blackman, Deputy Head of School of Social Sciences and Law. (Responsibility for Research in the School.)

¹²⁸ Bryman A. and Cramer D. (1994) op cit

¹²⁹ Lord F.M. (1953) On the Statistical treatment of Football numbers American Psychologist 8 : 750-1 Cited in Cramer D. (1994) op cit

¹³⁰ Bryman A. and Cramer C. (1994) op cit

Several studies have cast doubts on the second and third categories: Boneau and Games and Lucas ¹³¹ suggest that violation of these two assumptions has little effect on the values of the tests, unless the samples are of different sizes and the variances are unequal. One suggestion for analysis of ordinal data¹³² is to use both parametric and non-parametric tests wherever possible.¹³³ Then, if both procedures lead to the same conclusion, this will add strength to the parametric findings. Where the procedures contradict each other, the non-parametric test should be reported.

In consideration of the above authoritative arguments, the fact that the sample was in excess of 200 and on the advice of the statisticians who were consulted, it was decided to conduct parametric tests where appropriate and corroborate these with non-parametric tests, when these were available and appropriate. Where there is a contradiction in test results, this is reported.

7.5 Choice of statistical tests.

Both descriptive and inferential statistics were used as appropriate:

7.5.1 Descriptive statistics.

(i) Frequency and cross-tabulations

The first step in analysing the quantitative data was to use descriptive statistics to look at the pattern of responses and to profile the population. Thus, frequency distributions and cross-tabulations were conducted and analysed on the major variables. For example: On the variable **Would you consider using ADR to resolve a construction dispute? Yes,**

¹³¹ Boneau C.A. (1960) C A The Effects of Violations of Assumptions Underlying the t test Psychological Bulletin 57 :49-65 Games P. and Lucas P. (1966) Power of the Analysis of Variance of Independent Groups on Non-normal and Normally Transformed data Educational and Psychological Measurement cited Bryman A. and Burgess R. (1994) op cit

¹³² Note the argument above, Chapter 3 para. 7.3, where the use of the Likert scale adopted is justified as being treated as an interval scale.

¹³³ Blalock H. (1988) Social Statistics (2nd Edition) Mcgraw-Hill: Singapore, cited in Breakwell G. et al (1995) op cit

no, or don't know.

The responses were summarised. Then cross-tabulations were made between main contractor and sub/specialist contractor. Further cross-tabulations were run between the categories of size by turnover.

(ii) **Observed means and standard error means.**

Observed means and standard error means were given for the responses to the attitude statements.

(iii) **Confidence Intervals (CI)**

A 95% confidence interval was calculated for the population mean. Using a 95% CI means that, on 95% of occasions when the CI is calculated, the mean will fall within the calculated interval.¹³⁴

7.5.2 Inferential statistics.¹³⁵

(i) **Loglinear Models.**

Loglinear Models were formulated to analyse the categorical data. These models disclose the relationship (association) among the variables in a multiway cross-tabulation. For example, on the dependent variable: **Would you consider using ADR to resolve a construction dispute? Yes, No, Don't Know**, the independent variables of "contractor type" and "turnover size" are the classification and the dependent variable is the number of cases in the cell of the cross-tabulation.¹³⁶ A loglinear model will analyse whether there is any interaction on the dependent variable between type of contractor ("contractor type") and size of organisation ("turnover size"). It provides a partial chi-square test and

¹³⁴ Rees D. G. (1995) Essential Statistics 3rd Edition Chapman and Hall: London

¹³⁵ Senior researchers in the School of Social Sciences and Law were consulted before deciding on the most suitable inferential statistics. Chapter 3 para 7.5

¹³⁶ Norusis M.J. (1993) SPSS for Windows Advanced Statistics Release SPSS inc: Chicago

has a more robust likelihood ratio than Pearson's chi-square.¹³⁷

(ii) Analysis of Variance.

One objective of the research was to discover whether the different groups of "contractor type" and "turnover size" differed on some variables. Therefore, statistical tests of difference had to be selected. The research design was of three or more independent groups. As a consequence, the inferential statistical test selected was Analysis of Variance.

(iii) Multivariate Data.

Many writers warn against the use of multiple ANOVA (Analysis of Variance) tests when there are two or more groups and several dependent variables.¹³⁸ Adopting this practice may increase the probability of finding a significant statistical difference. (Type 1 Error)¹³⁹ As the data collected comprised a number of independent variables as well as multiple dependent variables the analysis undertaken was multivariate analysis of variance. (MANOVA)

Where significant differences were found for groups with three cells, post hoc multiple comparison procedures were carried out on the independent variables to determine which groups' means differed from each other. These tests adjust for the number of comparisons of means which are made and therefore avoid the danger of finding too many significant differences between groups. The Scheffé test¹⁴⁰ was used because it is least likely to make a Type 1 error (an erroneous significant result) and because the groups were unequal in "turnover size";

¹³⁷ *ibid*

¹³⁸ Breakwell G. et al (1995) *op cit*, Bryman A. and Cramer D. (1992) *op cit*, Stevens J. (1986) Applied Multivariate Statistics for the Social Sciences Lawrence Erlbaum Associates: Hillsdale

¹³⁹ Breakwell G. et al (1995) *op cit*

¹⁴⁰ The Scheffé test performs simultaneous joint pairwise comparisons for possible pairwise combination of means. It uses the F sampling distribution. Norusis J. (1993) *op cit*

*"This test is the most conservative in the sense that it is least likely to find significant differences between the groups, -or, in other words to make a Type 1 Error. It is also exact for unequal numbers of subjects in the groups."*¹⁴¹

It was decided not to use correlations on the data for a number of reasons:

1. The main objective of the statistical analysis was to investigate the difference between the groups in the sample on the attitude statements and this was performed by the MANOVA test.
2. Due to the large number of variables involved, correlations were not a suitable method for descriptive presentation of the data.
3. The advice of the statistical experts consulted.

7.6 Statistical significance

Before statistical tests were performed, the level of statistical significance was decided on. The conventional 0.05 level of probability was selected, as most researchers in the social sciences and behavioural sciences employ this level.¹⁴² Further, after consultation with statistical experts,¹⁴³ it was decided also to report results up to the 0.10 level to indicate possible trends in the findings.

8 FOLLOW-UP INTERVIEWS WITH RESPONDENTS

Once the postal survey had been completed, a descriptive analysis was made of the data and content analysis performed on the open questions of the survey. Interviews were then arranged from a sample of the respondents who had volunteered to give an interview. 72 respondents consented to follow-up interviews, which is indicative of the interest

¹⁴¹ Bryman A and Cramer D (1994) op cit

¹⁴² Cramer D. (1994) op cit, Bryman A. and Cramer D. (1994) op cit, Clegg F. (1990) Simple Statistics Cambridge University Press, Keppel G. and Zedeck S. (1989) Data Analysis for Research Design W H Freeman:New York.

¹⁴³ See chapter 3 para 7.5

generated by the topic of ADR and the issues it raises. The objective of the interviews were to probe some of the responses produced by the questionnaire. *"Put flesh on the bones of the questionnaire."*¹⁴⁴ Therefore, qualitative interviewing methods were adopted.

8.1 Methodology

This type of research has been called "focused sampling"¹⁴⁵ or "theoretical sampling",¹⁴⁶ which is a selected study of particular groups which will give good illustrative examples.

*"A good example of focused sampling is to extend and complement a national survey with in-depth interviewing of a selected group."*¹⁴⁷

A "non-directive" interviewing approach was rejected as it has been said that this leads to anxieties in the interviewee and, therefore, the quality of the interview is jeopardized.¹⁴⁸ The design of the interview was therefore "open-ended". A schedule for the interviews was devised, which was a framework made up of topics around which the interviews were to be structured.¹⁴⁹

8.2 Interview schedule

Before the schedule was devised, frequencies and cross-tabulations were run on the

¹⁴⁴ Bell J. (1987) Doing Your Research Project Oxford University Press

¹⁴⁵ Hakim C. (1987) Research Design: Strategies and choices in the Design of Social Research Unwin Hyman: London.

¹⁴⁶ Glaser B. and Strauss A.L. (1967) The discovery of Grounded Theory Chicago: Aldine Cited in Hakim C. (1987) op cit

¹⁴⁷ Hakim C. (1987) op cit

¹⁴⁸ Whyte W.F. (1987) Learning From the Field Sage: London.

¹⁴⁹ See appendix 1

questionnaire data and content analysis¹⁵⁰ was conducted on the open questions on the questionnaire. These data provided the issues to be explored in more detail.

Before each interview, the questionnaires which the respondents had completed were studied, in order that any interesting comments that had been made could be investigated further.

The interviews were 40 minutes to 1 hour in duration. They were taped and transcripts were made of each interview.

8.3 Selection of Interviewees

Altogether, 25 interviews were conducted. The interviewees were selected on a number of criteria:

- i. **Those respondents who had used ADR.** This was felt to be particularly important, as only 9 respondents reported that they had used ADR and there is a lack of information in the literature on experiences of ADR.
- ii. **Respondents who had either refused to use ADR when it was proposed to them or who had proposed it to another party and the other party refused to consider it.** It was felt to be particularly appropriate to interview these respondents, as one of the objectives of the thesis was to consider the factors which impacted on the choice of ADR for dispute resolution. The qualitative material from these respondents would be invaluable to this objective.
- iii. **After studying the questionnaires, those respondents who had made any particularly interesting comments were selected for interview.**

As far as possible, taking into consideration the above criteria, the aim was to interview

¹⁵⁰ The same method of content analysis was employed as described for the indicator exercise. Chapter 3 para 4.1.3

an equal number of main contractors and sub/specialist contractors. However, this was not completely achievable, for a number of reasons: Most of the respondents who had used ADR were main contractors. Similarly, more main contractors fulfilled the criteria in the second category. Finally, it was extremely difficult to arrange interviews with sub/specialist contractors. Frequently, the person involved was unavailable either when the initial telephone contact was made to set up the interview or at the times the interviewer could conduct the interview. Ultimately the proportions were 15 main contractors to 10 sub/specialist contractors.

8.4 Content analysis of follow-up interviews

The method of content analysis of the follow-up interviews was the same as described for the indicator interview.¹⁵¹

9 QUALITATIVE RESEARCH OF LEGAL ADVISORS TO THE CONSTRUCTION INDUSTRY

The following objectives were to be achieved by the qualitative research into the role of legal advisors to the construction industry. The term 'legal advisor' is used in preference to 'the legal profession' as in construction, there is a growing reliance on the advice of claims consultants.¹⁵² The definition of legal advisor, therefore, includes claims consultants.

9.1 Objectives of the legal advisors' interviews:

- i. To investigate the perceptions that legal advisors in the construction industry have towards ADR.
- ii. To investigate the factors which influence the legal advisors recommendations as to dispute resolution process.

¹⁵¹ Chapter 3 para. 4.1.3

¹⁵² Latham M. (1993) Interim Report op cit

9.2 Hypothesis to be tested in the legal advisors' interviews

Legal advisors in the construction industry are influencing the development of ADR.

9.3 Methodology

The methodology of a quantitative postal survey of legal advisors was rejected for a number of reasons. First, in discussions with people involved in the legal profession, there was little confidence expressed that a questionnaire would achieve a good response rate. Second, the main thrust of the thesis was an investigation of the factors which impacted on the choice of ADR for main contractors and sub/specialist contractors and, therefore, the interviews with legal advisors were to be used to test the broad propositions which had been revealed in the postal survey and the follow-up interviews. Third, and more significantly, the questions to be asked were of a sensitive nature and it was decided that a personal interview would be more successful in gaining insight into the issues to be explored. Fourth, the financial constraints on the research were such that a second large postal survey was not practical.

The methodology selected to investigate the objectives set out above was "in-depth interviewing" by "focused sampling"¹⁵³ or "theoretical sampling".¹⁵⁴ The advantages of this particular type of study are that it provides illustrative examples and is good for testing broad propositions.¹⁵⁵

9.3.1 Researching sensitive topics

The definition of 'sensitive topics' is broad in some of the literature and extends to those areas which are not confined to the "taboo" in social life. Thus Lee¹⁵⁶ gives a simple

¹⁵³ Hakim C. (1987) op cit

¹⁵⁴ Glaser B. and Strauss A.L. (1967) The Discovery of Grounded Theory Aldine: Chicago
Cited in Hakim C. (1987) op cit

¹⁵⁵ Hakim C. (1987) op cit

¹⁵⁶ Lee R. M. (1993) Doing Research on Sensitive Topics Sage: London

definition, "*research which potentially poses a substantial threat to those who are or have been involved in it*".

As stated earlier, there is considerable criticism of the legal advisors to the construction industry which has been expressed in the literature and the indicator interviews. The postal questionnaire had an open question where the respondents were first asked if they would settle a dispute without using a legal advisor and then asked to comment on their decision. The complaints did not only centre around their costs and time, though this is a major complaint and commented on in no uncertain terms in the survey. There are more deep-rooted concerns that often the legal advice is poor and the conduct of the dispute resolution process is not conducted with the interests of the parties in mind but rather in the interests of the legal advisor. Further, there are concerns that the formal system is being manipulated by the legal profession, which can take the form of using the formal procedures to lengthen the dispute resolution process or as a "threat for settlement."¹⁵⁷

Therefore, the interview agenda had several objectives:

- i. To explore the perceptions of legal advisors towards ADR.
- ii. To discover the factors which influence legal advisors to recommend ADR.
- iii. To examine how legal advisors perceived utilising ADR in the dispute resolution process.

9.4 Design of interviews

There were 14 interviews in total, which comprised 5 barristers, 7 solicitors and 2 claims consultants. Potential interviewees were identified in discussions with supervisors¹⁵⁸ and

¹⁵⁷ Chapter 2 para 4.2.1

¹⁵⁸ The advice of Professor Anthony Lavers was sought at this point. He has many contacts in the Construction Law field. Following discussions and a consideration of the various factors which had to be taken into account, a list of potential interviewees was selected.

were selected using a "purposive" and "snowballing" strategy.¹⁵⁹

Various factors were taken into consideration; Interviewees were selected from those who specialised in the construction field and were chosen from several regions in the country. Comments made on the questionnaire and in the follow-up interviews with respondents about using a "London firm", had indicated several contradictory perceptions. On the one hand, reference was made to using the 'best' solicitors, perceived to be the 'big London firms'. On the other hand, there were general criticisms of those firms' costs and the use of provincial firms was endorsed as providing a better service. In the past, most large construction dispute work was done in London but, recently, a few provincial firms have risen in prominence in the construction field and several large London firms have begun to extend their specialisation to their regional offices. This was reflected in the choice of interviewees. Therefore, a mix was achieved of both London and provincial firms.

While the leading specialists construction chambers are said to be those in London, such as Keating Chambers, there is also significant construction work in provincial chambers. Therefore, the barristers interviewed came from the construction bar in London, Manchester and Bristol.

A letter was written to request an interview of about 40 minutes, to discuss ADR and the results of the survey.¹⁶⁰ At the outset an agenda was given for the general structure of the interview.¹⁶¹ The interview schedule was devised taking into consideration the content analysis of the postal questionnaires and the follow-up interviews. The first question was an open question to elicit the interviewee's experiences with ADR and general views on the topic. The remainder of the agenda highlighted some of the responses given in the survey and the interviewee was asked to comment on these. A tape recorder was used, although there was some concern that its use might inhibit the interviewees and prevent

¹⁵⁹ Oppenheim A. N. (1996) *op cit*

¹⁶⁰ See appendix 3

¹⁶¹ See appendix 3

more revealing comments. However, taking into account the possibility of losing "illustrative material" (as was noted in the indicator interviews)¹⁶² when only hand written notes were used, the sophistication of the interviewees and the confidentiality which was assured to each interviewee, it was decided to use a tape recorder. The intention was to abandon the tape recorder if the interviews were felt to be adversely affected.

9.5 Analysis of legal advisor interviews

The method of content analysis used was the same as described for the indicator interview.¹⁶³

10 Rejection of case study design

The possibility of using a case study design was considered as part of the methodology. If case studies were to have been undertaken, they would have to be of documentary investigations of perhaps 4 or 5 construction disputes, which had reached a final resolution using different dispute resolution procedures. The design would have to be predictable, different (systematic) replication.¹⁶⁴

This choice of methodology was eventually rejected for several reasons:

- (1) Arbitration and ADR are confidential and private in nature and it is unlikely that all the parties involved would wish to participate in the research.
- (2) Solicitors' records are confidential.
- (3) All parties to the dispute would need to give their permission for the study. This would include the people on site (if the dispute arose on site), managerial personnel involved in the dispute, legal advisors and expert witnesses. As

¹⁶² Chapter 3 para. 4.1.2

¹⁶³ Chapter 3 para. 4.1.3

¹⁶⁴ Yin R. (1989) Case Study Research Design and Methods Sage: London
Yin R. (1993) Applications of Case Study Research Sage: London.

litigation and arbitrations take a long time to reach a conclusion there was possibility that reaching the personnel involved may have been impossible.

- (4) Documentary evidence may not reveal the true factors behind decisions in dispute resolution. A meeting may well be recorded but the reasons for the decision and the arguments made by the different parties may not be. The documentary evidence would need to be corroborated by interviewing relevant personnel.
- (5) The objective of the thesis is to consider the development of ADR and the factors which influence its choice of dispute resolution and a detailed investigation into examples of litigation and arbitration would have diluted the study.
- (6) Experience with ADR is limited in the UK at present¹⁶⁵ and it would have been difficult to find parties who have used it and were prepared to participate in a detailed case study.¹⁶⁶
- (7) Following the indicator interviews it was decided to extend the research to a qualitative investigation of the role of legal advisors in dispute resolution. This considerably extended the study.
- (8) Detailed case studies would be justified as a totally separate study.

This chapter has explained the research methodology, which was designed to achieve the aims and objectives of the thesis. First, the literature search and the in-depth indicator interviews with personnel involved in the construction industry were described. These were undertaken to develop the hypotheses of the thesis. Next, the research involved a

¹⁶⁵ Fenn P. and Gould N. (1994) op cit

¹⁶⁶ In an interview with Carl Mackie of CEDR, he indicated that they could not get the parties to mediation to agree to publish their experiences in CEDR's publication, even with the promise of confidentiality, as the parties thought that a description of the dispute they had been in would be enough to identify them in their industry.

multimethod approach, which incorporated a postal survey, telephone interviews to assess non-response and in-depth interviews of main contractors and sub/specialist contracts. A separate study of the legal advisors in the construction industry was designed, which involved in-depth interviewing. The method of content analysis of the data was explained. Finally, the choice of parametric statistical tests was justified and the statistical tests which were selected were defined.

CHAPTER 4

RESULTS

This chapter examines the first hypothesis of the thesis, which was formulated to explain the growing awareness of and interest in ADR;

The development of the use of ADR by main contractors and sub/specialist contractors in the construction industry is due to dissatisfaction with the formal systems of dispute resolution.

The first section of the chapter considers briefly the major criticisms of the formal systems:¹ their costs in both time and money, their use of the adversarial approach and their tactical manipulation in resolving disputes in the construction industry. The section describes the results of the postal survey to the questions which were designed to assess the perceptions of ADR in comparison to the formal systems. The results reported are from the respondents in total, main contractors and sub/specialist contractors together. The second section analyses significant statistical differences between main contractors and sub/specialist contractors and groups categorised by turnover size² on these perceptions. Section three reports the findings on the use of ADR by the survey respondents and any differences between groups. Section four appraises the findings and confirms or rejects the first hypothesis.

1 SECTION ONE.

1.1 Perceptions of the formal systems of dispute resolution and comparative perceptions of the advantages of ADR.

The major criticisms about the formal systems of dispute resolution in the construction

¹ See Chapter 2, which discusses the concept of the formal systems of dispute resolution, the assimilation of arbitration into the formal system, the use of an adversarial procedure and the adoption of an adversarial approach in arbitration. Chapter 2 paras. 1, 2-3 and 3.2-3.2.2

² The size of operation of contractor is discussed in Chapter 3 para 5.2.2.1

industry centre around the issues of costs, time (both in wasted management time and the delay in settling disputes) and the adversarial, threatening, complex nature of litigation and arbitration.³ It is the testing of the disputants' argument through formalised court procedures of examination, cross examination and challenge by the opposing side, which is regarded as confrontational and for many people, who are not experienced in the procedures, as threatening. Further, there exists in the construction industry a perception that the formal procedures are used tactically to create delay in the settlement of disputes and force unfavourable settlements on the financially weaker party.⁴ Even the language of the formal procedures conveys an atmosphere of hostility, confrontation and suspicion.⁵

One objective of the postal survey was to test the first hypothesis. Attitudinal questions were devised to test the general level of satisfaction that main contractors and sub/specialist contractors held towards arbitration and litigation. Further questions required the respondents to draw comparisons between ADR and the formal procedures in order to assess how the perceived dissatisfaction is creating positive perceptions about ADR.⁶ The strength of these positive perceptions will be assessed in this chapter. The respondents were asked to rate their attitude to statements, relating to the major criticisms of the formal procedures and the comparative advantages of ADR. These attitudinal statements had intervals associated with the following verbal anchors: strongly agree, agree, neutral, disagree and strongly disagree.

The results in this section are first described by summarising the percentage of the total survey population responses. Subsequently, the data are examined descriptively by analysing the mean distribution of the level of agreement that the respondents have with the attitude statements. Finally, a 95% confidence interval (CI) is given for the survey

³ See chapter 2 paras. 1-3.3

⁴ See chapter 2 para. 4.2.1

⁵ Nader L. (1988) *op cit*

⁶ See chapter 2 paras. 5-5.1

population means.⁷ The null hypothesis is that the mean response is 3 (neutral), therefore, if the CI does not include 3, one is 95 % confident that the population significantly differs from the mean.

1.1.1 Adversarial system.

The postal survey tested the respondents' general attitude to the adversarial system of dispute resolution by asking the respondents to assess their attitude to the following statement: **There is a need to move away from the adversarial approach.**

Figure 5: There is a need to move away from the adversarial approach.

Column Total	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	88	76	26	5	6	201
%	43.8%	37.8%	12.9%	2.5%	3%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: There is a need to move away from the adversarial approach.

Figure 5 shows that 81.6% (strongly agree + agree) (43.8% + 37.8%) of the respondents agree with the statement that **the construction industry needs to move away from the adversarial approach** and only 5.5% disagree (strongly disagree + disagree) (2.5% + 3%). The observed mean response to this attitude is 1.83 (S.E. mean 0 .07) (95% CI: 1.64 - 1.97). The CI indicates that the survey population are significantly in agreement with this statement. This suggests that there is a strong perception held by contractors that the adversarial approach, as a method of resolving disputes in construction, needs to be assessed and changed.

The confrontational nature of arbitration and litigation was summed up by one respondent in the follow-up interviews to the postal survey:

"Well it's like war...you know you are going to get hurt..It's like when you go to a boxing match you know you are going to get hurt. "

⁷ Chapter 3 para. 7.5.1

The interviewees from the postal survey perceive the lawyer as taking on the opposition lawyer as his opponent. The dispute is taken out of the hands of the disputants and the lawyers are now in charge. The procedures in both litigation and arbitration have become so complicated that the disputants relinquish control over the dispute to professional legal advisors. As one interviewee, representing an organisation with a turnover of under £50 million but over £6 million, (medium size)⁸ stated:

"Once a dispute involves legal advisors, it is often the case that control of one's destiny can be lost, as the legal advisors tend to take overall control and drive the dispute to its eventual resolution in the courts."

The effect of the adversarial system was described by interviewees, who had experienced first hand either arbitration or litigation, as a negative, *"bitter experience"*. Many of those who were surveyed, who had gone through either of the formal systems, are disinclined to repeat the experience. A main contractor stated that:

"As a company we have had one bitter experience of going to law....but there have been a few cases that have gone the distance and have not been a very happy experience for us in any way."

A similar view was expressed about arbitration. After describing the details of an arbitration which the company had recently gone through, a representative of a specialist contracting company concluded:

"To me, that was the end of a very bitter experience; if there had been an easier, quicker, cheaper way of settling it, then I would have gone for that..... I would not wish to go to arbitration again."

The follow-up interviews illustrate that both main contractors and sub/specialist contractors hold negative perceptions about the adversarial approach to dispute resolution.

⁸ Chapter 3 para. 5.2.2.1

Considerable blame is attached to the legal profession, who are perceived to be the beneficiaries of such an approach. This censure of the adversarial system is leading to a perception that there are other, less antagonistic, procedures that can be used to resolve disputes. After litigation which ended up in the Court of Appeal, an interviewee said:

"...it was crazy that we had got ourselves into that situation to keep a lot of barristers, lawyers and judges in business over a civil matter which really two heads should have been able to resolve."

1.1.2 Threatening nature of the adversarial approach.

The examination procedures used to test the arguments in the adversarial systems are frequently portrayed as threatening and daunting to non-legal personnel involved in disputes. The respondents of the postal survey were asked to measure their level of agreement to the following statements: **ADR is a less threatening forum than a court of law** and **ADR is a less threatening forum than arbitration**.

Figure 6: ADR is a less threatening forum than a Court of Law.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	14	152	30	3	0	199
%	7%	76.4%	15.1%	1.5%	0%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR is less threatening than a Court of Law.

Figure 7: ADR is a less threatening forum than arbitration.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	9	121	55	5	0	190
%	4.7%	63.7%	28.9%	2.6%	0%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR is less threatening than arbitration.

Figure 6 shows that 83.4% (strongly agree + agree) (7% + 76.4%) of the respondents agree with the statement that **ADR is less threatening forum than a Court of Law**.

The observed mean for this statement is 2.11 (SE mean 0.04) (95 % CI: 2.04 - 2.20), which indicates that contractors are in significant agreement with the statement. Figure 7 shows that the attitude regarding arbitration is less strongly held, 68.4% (strongly agree + agree) (4.7% + 63.7%) of the respondents agree with the statement that **ADR is less threatening forum than arbitration**. The observed mean is 2.29 (SE mean 0.04) (95 % CI: 2.21 - 2.39), which indicates a significant level of agreement. The descriptive findings for Figures 1,2 and 3 are confirmation of the negative attitudes held by contractors towards the adversarial approach of the formal procedures.

These findings are supported by illustrative comments made by the respondents and interviewees. The threatening nature of the formal systems is described by the respondents and interviewees as a *"nerve wracking"* experience even for contractors experienced in cross examination. One legal executive in a large main contracting firm explained the procedure of giving evidence:

"I think giving evidence for anyone in High Court or in an arbitration is fairly nerve-wracking. You could always see witnesses beforehand and they are absolutely wound up. Of course, if you have got a number of members of the Bar and they are good and very clever, they can keep on asking you questions. Those witnesses are quite intelligent and they think they know what he is trying to get at and, of course, what a lot of them don't realise is that he is carrying on asking questions, then he'll shoot back to something else. Then all of a sudden oops and it is very upsetting...."

One interviewee recounted his experiences of the adversarial procedures:

"It is very stressful: there is no doubt about that. I was cross examined by a lady barrister. They are there to make you feel damned uncomfortable and they are very good at it."

In comparison to the formal systems, ADR is invested with the positive perception of being non-threatening and non-confrontational. The adversarial approach is summed up by one respondent:

"The present approach of confrontation and conflict is ruining the construction industry and ways must be found to change attitudes. ADR is a step in the right direction."

1.1.3 Non confrontational nature of ADR.

In contrast to the perception of the threatening nature of the formal procedures, ADR has been portrayed as non confrontational.⁹ The respondents were asked to compare how confrontational ADR was with the formal systems by assessing their level of agreement with the statement: **ADR is less confrontational than formal systems of dispute resolution.**

Figure 8: ADR is less confrontational than the formal systems of dispute resolution.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	14	111	72	1	2	200
%	7%	55.5%	36%	0.5%	1%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR is less confrontational than the formal systems of dispute resolution.

Figure 8 reveals that 62.5% (strongly agree + agree) (7% + 55.5%) of respondents agree that **ADR is less confrontational than the formal systems of dispute resolution**, and only 1.5% disagree (disagree + strongly disagree) (0.5% + 1%). The observed mean is 2.33 (SE mean 0.05) (95% CI: 2.21 - 2.41), which shows that there is a significant level of agreement with this statement. This result, together with the preceding condemnation of the adversarial system, is a clear indication that the respondents who have knowledge about ADR perceive it as providing a different and better approach for resolving disputes. The difference between ADR and the adversarial systems was commented on in the interviews and in the survey. The advantage of ADR is that, in contrast to the formal systems, it does not only focuses on the issues of the dispute but considers other aspects of the relationship of the parties. It is because of this that the relationship may be preserved after the dispute is settled. As one interviewee commented:

⁹ Chapter 2 paras. 5-5.1

"...(the adversarial approach) it inevitably concentrates on what you don't agree on: with ADR you can at least say, 'Well 99% of the stuff we all agree on, it's just a minor part of what has gone on that is causing the dispute'. Whereas, in arbitration, all you talk about is the 1%."

A frequent viewpoint which was expressed in the comments by the respondents and the interviewees is that any method of resolving dispute would be an improvement on arbitration and litigation, which supports the hypothesis that the development of ADR is due to dissatisfaction with the formal systems of dispute resolution:

"anything is better than the confrontational attitude."

"I really think the ADR suggestion is that it is going to be less confrontational than the formal system."

1.1.4 Costs of arbitration and litigation and ADR

One major concern, which had been expressed in both the literature and the indicator interviews,¹⁰ is the cost involved in running a dispute through the arbitration and litigation procedures.¹¹ The postal survey asked the respondents to gauge their level of agreement to the following statements regarding the costs of the formal procedures of dispute resolution: **Litigation costs too much and arbitration costs too much.**

Figure 9: Litigation costs too much

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	123	64	12	2	1	202
%	60.9%	31.9%	5.9%	1%	0.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: Litigation costs too much.

¹⁰ See chapter 2 paras. 3.1.1. and 3.2.1.

¹¹ Bingham (1992) op cit, Royce (1989) op cit, Morris (1991) op cit, Miller (1992) op cit and see chapter 2 paras 3-3.1 and paras 3.2-3.2.1

Figure 10: Arbitration costs too much

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	89	73	36	4	1	203
%	43.8%	36%	17.7%	2%	0.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: Arbitration costs too much.

Figure 9 reveals that there is an extremely high level of agreement amongst respondents with the statement that **litigation costs too much**. Over 90% (strongly agree + agree) (60.9% + 31.9%) of the respondents agree that litigation costs too much and this includes 60.9% who strongly agree. The observed mean for the statement is 1.49 (SE mean 0.05) (95% CI: 1.39 - 1.60), which is a highly significant level of agreement with the statement.

Figure 10 shows that 79.8% (strongly agree + agree) (43.8% + 36%) of the respondents agree with the statement that **arbitration costs too much** and this includes 43.8%, who strongly agree. The observed mean for the statement is 1.79 (SE mean 0.06) (95% CI: 1.70 - 1.95), which is again a highly significant level of agreement.

When the observed means are listed in descending order of agreement,¹² the statement, **Litigation costs too much** heads the table and the statement, **arbitration costs too much** is in third position. These findings show that respondents are very strongly in agreement with the statements that the formal systems of dispute resolution cost too much and reveal an overwhelming dissatisfaction in this area. This attitude is confirmed extensively both in comments made in the postal survey and in the follow-up interviews, by both main contractors and sub/specialist contractors. A picture emerges of escalating costs, which frequently outstrip the value of the dispute. An interviewee representing a main contracting firm recounted a recent dispute they had been engaged in, which illuminates some of the costs of going to court:

¹² See appendix 4

*"...we got caught in a copyright dispute by a small sub-contractor over fencing, back to back with our client, who had provided us with the drawings in the first instance. The sub-contractor was looking for something like £40-£50,000 as a settlement, which we considered to be outrageous in terms of the overall argument. I got QC (Queens Counsel) opinion who says it is worth £7,000. It cost me £30,000 just to avoid the first part of the hearing in legal fees and an acknowledgement that we were in the wrong. We have not yet decided what the damages are going to be. At the end of the day, I am going to pay more in legal fees than I could have negotiated in settlement.It was an intellectual property rights case which is a completely new area of law to me. We needed specialists. We ended up with specialist QC, partner in law firm of *** (one of the leading construction law firms), his para-legal assistant, expert witness and all those reports prepared. We got to the court house steps and agreed liability. Agreed to pick up the costs. Although the second defendant contributed to our overall position, at the end of the day, it is not going to be enough to cover the costs."*

A major part of the costs of using the formal procedures is caused by the rules governing discovery, which result in huge quantities of paperwork. This paperwork is costly, in both management time and monetary terms, and interviewees and respondents identified the lawyers as responsible for generating the need for it. The process was explained by an interviewee, who was the head of an in-house legal department of one of the largest main contracting companies in the UK:

"This is one of the problems of arbitration, first of all people make requests for further and better particulars and really, probably, 99% of them are totally irrelevant....You can go to a hearing and you can have hundreds of lever arch files in agreed bundles and at the end of the hearing the numbers of documents actually referred to would probably fit into a couple of lever arch files....The trouble is, of course, that most of it is irrelevant, but the lawyers say, 'Well you have got to see everything, there may be something there'. Of course, this is where the cost of litigation goes storming up. It makes it totally unpredictable, especially in building and engineering cases, because builders and engineers create so much paper....."

The adversarial system, with its insistence on technical procedures and complex rules, adds to a sense of helplessness on the part of the beleaguered contractor. As another medium sized contractor complained:

"Well, I think the procedure is totally cumbersome and you sink under paper. Then it is all the stuff when you start preparing for court, all the pleading. It's horrendous. I start losing track of it. I just feel the crux of the point just gets submerged in an absolute mass of trivia. It all takes time and there is more paper. Of course, every bit of paper has got to be read and the costs just go up. The man hours spent by the legal people reading and re-submitting and considering and responding and pleading. It is just horrendous and crazy."

The perception of the excessive costs of the formal systems are resulting in positive comparisons being drawn with ADR and its perceived advantages, which are illustrated in by comments made in the survey and the interviews:

"We would consider ADR, as arbitration and litigation are expensive and the cost of pursuing minor amounts prohibitive. As we have not yet experienced ADR, we are not currently aware of the pitfalls."

In order to test the extent of the positive perception respondents hold about the costs of ADR compared to the formal systems, the respondents to the survey were asked to assess their response to the following statement: **ADR is cheaper than formal dispute resolution.**

Figure 11: ADR is cheaper than formal dispute resolution.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	45	94	54	5	1	199
%	22.6%	47.2%	27.1%	2.5%	0.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR is cheaper than formal dispute resolution.

Over 69% (strongly agree + agree) (22.6% + 47.2%) of the respondents are in agreement with the statement that **ADR is cheaper than the formal systems of dispute resolution**. (See figure 11) The observed mean is 2.11 (SE mean 0.06) (95% CI: 2.0 - 2.24), which demonstrates there is significant agreement with the statement. This response may be a 'knee jerk' reaction to the "horrendous" costs of this formal systems. Over one quarter of the respondents are neutral to this statement, with the corollary that only 3% disagree (disagree + strongly disagree) (2.5% + 0.5%).

In contrast to this perception about the relative cheapness of ADR, only 5.9% of respondents are neutral to the statement that litigation costs too much. (See Figure 9) This figure, together with the reported observed means, is evidence that the perception regarding the costs of litigation is more strongly held than that regarding the relative cheapness of ADR. An experienced main contractor made an observation about the costs of both the formal systems:

"I normally settle disputes by negotiations and have been responsible for settlement of disputes for many years, I have very little knowledge of other means of settlement apart from arbitration and litigation, both of which are costly and slow."

The perception that the formal systems are too expensive is confirmed by the responses in the questionnaire about the costs of litigation and arbitration. (See figures 9 and 10). In contrast to this attitude, the results indicate that there is a strongly held perception that ADR is a cheaper method of dispute resolution. This view is supported by respondents and interviewees who maintained that there is an *"urgent need for a cheaper method for resolving disputes."* Interviewees who had little knowledge of ADR expressed the view that it has to be better than the alternatives because of the prospect of it being cheaper:

"...(ADR) but the fact that it is described as an alternative disputes resolution.....by indication it is going to be beneficial. It is going to be cheaper. It is going to be better..."

The perceptions held by the respondents, about the costs of the formal systems, together

with the perceived cheapness of ADR, will be a likely factor which will be taken into consideration in the developing use of ADR. Part of the costs of the formal procedures are the legal advisors' fees, which the literature search and the indicator exercise have revealed are a major concern in the construction industry.¹³ This is discussed in detail when the positive advantages of ADR are discussed.¹⁴

1.1.5 Manipulation of the formal systems to create delay

A major criticism made in the construction industry is that the disputants and their legal advisors manipulate and tactically use the formal procedures in the process of settling disputes.¹⁵ This problem was commented on in the indicator interviews and has received considerable coverage in the construction literature, where it has been the focus of other research in the industry.¹⁶ It was also the subject of investigation in the Latham Review¹⁷ and condemned as a practice in the Woolf Report on Civil Litigation.¹⁸ One way in which the formal systems are perceived to be manipulated is by using them to create delay in reaching a final settlement. The indicator interviews had shown that there is extensive tension between main contractor and specialist/sub contractor, which has manifested itself in the criticism of the manipulation of the formal systems. This resulted in narrowing the research to the interface between these two sections of construction.¹⁹

Delay in settlement of dispute.

To test the level of concern about delay in reaching settlement when disputes have arisen, the respondents to the survey were asked to measure their level of agreement with the statement: **Construction industry disputes need a quick decision.**

¹³ See chapter 2 paras. 3.-3.1.1 and 3.2.1-3.2.2

¹⁴ See chapter 4 paras. 1.2-1.2.4

¹⁵ Chapter 2 para. 4.2.1

¹⁶ Hoare D.J. et al (1992) op cit

¹⁷ Latham M. (1993) Interim Report op cit

¹⁸ Lord Woolf (1996) Final Report op cit

¹⁹ Chapter 3 para. 4.1.4

Figure 12: Construction industry disputes need a quick decision.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	73	109	17	3	1	203
%	36%	53.7%	8.4%	1.5%	0.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: Construction industry disputes need a quick decision.

Over 89% (strongly agree + agree) (36% + 53.7%) of the respondents are in agreement with the statement that **construction industry disputes need a quick decision**. (Figure 12) The observed mean is 1.77 (SE .05) (95% CI: 1.67 - 1.87), which is a significant level of agreement with the statement. When the observed means for the strength of agreements to statements are recorded numerically, this statement is in second position after **Litigation costs too much**.²⁰ The response to this attitude statement clearly signifies the level of importance awarded to the issue of resolving disputes expeditiously. Not only do the respondents and the interviewees perceive that the formal systems are manipulated to create a deliberate delay, the procedures themselves are viewed as drawn out, time consuming and slow to come to fruition. This attitude is corroborated by the evidence of one interviewee:

"arbitration and the law takes a very long time to reach either getting to court or sitting around the arbitrators' table. If a system of ADR were able to accelerate that, getting a decision or resolution within 6 months as opposed to 2 years plus, then obviously it has got to be better, because the costs of the legal fees and the cost of discovery of documents and all the stupidity that goes on and the silly questions that get asked, which are only quite frankly delaying tactics to spread the thing out. Then certainly it has got to be good." (Emphasis provided)

The respondents to the survey and interviewees confirm that both main contractors and sub/specialist contractors are concerned with potential manipulation of arbitration and

²⁰ Appendix 4

litigation. Interviewees who are sub/specialists testified to the manipulation of the formal systems " by *unscrupulous main contractors*". Sub/specialist contractors evinced concern that the delay caused by main contractors drawing out the legal procedures could result in the sub-contractor going out of business before settlement was reached. Main contractors had nothing to lose by "*insisting*" on litigation or arbitration knowing that it would take too long and cost too much for the sub-contractor to fight his claim.

Concerns about the manipulation of the formal systems are not confined to sub/specialist contractors. Main contractors' complaints centre around the issue of the sub/specialists using the formal systems to put pressure on them to reach settlements in disputes which are often only of a nuisance type:

"The next thing you have is some claims man coming in. Nobody wants to solve anything, they just want to blackmail you. Cost pressures. Okay, you can deal with that but it is a waste of resources."

The sub/specialist contractors are frequently portrayed in this tactical game as unsophisticated players. In any disagreement, even over "*stupid things*", their first reaction is to send out a writ. Main contractors accuse them of using a 'hammer to crack a nut' in order to get the main contractor to take action about their claims. Often, it is perceived by the main contractor that there is no intention on the part of the sub/specialist of "*going the distance*", but the formal systems are used as a "*signal*" to the main contractor that they want the issue resolved. As one main contractor explained:

"well, I must confess, when we get into sub-contractor dispute of a minor nature, you're dealing with people who are not necessarily from a technical background in contract or legal matters. What they tend to do is reach for a writ, whether they are right or wrong."

A sub-contractor admitted to using this ploy:

"We have used the threat of arbitration to at least get a meeting with the contractors and get some money out of them."

The formal systems lend themselves to manipulation, whether the disputant is the plaintiff or the claimant, the main contractor or the sub/specialist contractor. Arbitration and litigation provide weapons for attack to threaten the opposition, or if one is defending, they can be utilised to slow down the whole process of settlement. One contractor illustrated how these tactics of the formal systems are utilised:

"I do not know of a single arbitration that worked satisfactorily. It is meant to be short and snappy but if one side does not want to play ball, does not want an answer, there is no way you can hassle it through. So from the point of view of the main contractor or even a sub-contractor, because the same applies to them, you can play attack or defence on this. The main contractor finds himself arbitrating here and holding off arbitration there and all playing by the same rules. If you know you are defending, you play it down, slow it down and eventually the guy gives up because he cannot afford to fund it. It is terrible, it is a disgrace."

1.1.6 Speed of ADR

The respondents were asked to make a comparison of the speed of reaching settlement between the formal procedures and ADR by measuring the level of their agreement to two statements: **ADR is a quicker method to reach settlement than litigation** and **ADR is a quicker method to reach settlement than arbitration**.

Figure 13: ADR is a quicker method to reach settlement than litigation.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	39	98	56	3	3	199
%	19.6%	49.2%	28.1%	1.5%	1.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR is a quicker method to reach settlement than litigation.

Figure 14: ADR is a quicker method to reach settlement than arbitration.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	14	104	72	7	2	199
%	7%	52.3%	36.2%	3.5%	1%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR is a quicker method to reach settlement than arbitration.

Figure 13 shows that 68.8% (strongly agree + agree) (19.6% + 49.2%) of respondents agree with the statement that **ADR is a quicker method to reach settlement than litigation**. The observed mean is 2.16 (SE mean 0.06) (95% CI: 2.09 - 2.39), which is a significant level of agreement.

Figure 14 shows that slightly fewer respondents agree with the statement that **ADR is quicker than arbitration to reach a settlement**, as 59% (strongly agree + agree) (7% + 52.3%) are in agreement, compared to 68.8% for litigation. The observed mean is 2.39 (SE mean 0.05) (85% CI: 2.32 - 2.54), which represents a significant level of agreement with the statement.

The results of the survey evidence serious dissatisfaction with the formal systems of dispute resolution, which is reflected in the positive perception that ADR is a quicker method of reaching settlement. The findings show there is a higher level of dissatisfaction for litigation when compared with arbitration. This point is addressed in detail below.²¹

A closer inspection of the results of the positive attributes of ADR compared to the arbitration and litigation (its quickness and cost), indicate that there is a significant level of agreement by the survey population, but there is also a relatively high level of neutrality. Where the respondents are only asked to consider their attitude to perceptions of the formal systems alone, there is a low level of neutrality and a high level of agreement of disagreement. (See for example figure 9 and 10) The likely cause of this is

²¹ Chapter 4 para. 1.1.7

an extensive level of dissatisfaction with the formal systems. Another possible cause is a lack of detailed knowledge about ADR, which results in a high level of neutrality. This explanation is reviewed further, when the respondents' perceptions about the potential advantages of ADR are explored below.²² The data from the survey comments and follow-up interviews support this proposition. Statements were made frequently by the respondents, to the effect that they do not know enough about ADR, but there has to be a better method of resolving construction disputes than is currently provided by either litigation or arbitration:

"I have to say that my only experience of dealing with disputes, apart from the proverbial horse dealing of the claim at the end of the day, is through the formal routes....I have had no experience of the other ways and means of settling dispute, but I believe there must be a better way, having had experience of both the other two."

The problem of delay, caused by the formal systems, is cited by the respondents and interviewees as a principal reason for considering to use ADR. One sub/specialist contractor who was interviewed refers to the delay experienced in arbitration as a major factor in the decision not to pursue a dispute which they had been in with a main contracting company:

*"We are currently in arbitration with ****, (stated one of the largest main contractors in UK) which is taking a phenomenal amount of time to even run through the preliminary stages, so I think we would be interested in using some sort of other procedure just to short cut it and to keep the costs down. We were going to start a second arbitration with another big contractor but, because of the amount of money that we were talking about, we decided it is not appropriate. It is not only the direct expense with lawyers and specialists, it is also our own management time getting tied up. We are looking, once we have finished the job, to pick up other work. To move on, instead of looking back on old contracts and trying to resolve them."*

²² Chapter 4 paras. 1.2-1.2.4

Respondents and interviewees alike commented that any method which led to a quick resolution would be considered. As a respondent to the survey stated:

"We would use any means that would proceed to a swift settlement. ADR has a place."

In order to examine the perceptions of the respondents about how satisfactory the formal systems are for settling construction disputes the following propositions were stated and the respondents asked to assess their level of agreement to them: **Litigation is a satisfactory procedure for resolving construction disputes and Arbitration is a satisfactory procedure for resolving construction disputes.**

1.1.7 Level of satisfaction with the formal systems

Figure 15: Litigation is a satisfactory procedure to resolve dispute.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	4	22	50	85	41	202
%	2%	10.9%	24.8%	42.1%	20.3%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: Litigation is a satisfactory procedure to resolve disputes.

Figure 16: Arbitration is a satisfactory procedure to resolve dispute.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	1	62	75	47	17	202
%	0.5%	30.7%	37.1%	23.3%	8.4%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: Arbitration is a satisfactory procedure to resolve disputes.

Figure 15 discloses that the respondents are extensively dissatisfied with litigation. 62.4% (disagree + strongly disagree) (42.1% + 20.3%) disagree with the statement that **litigation is a satisfactory procedure to resolve construction disputes.** (This includes

over 20% who strongly disagree.) The observed mean is 3.68 (SE mean 0.07) (95 % CI: 3.59 - 3.87), which is a significant level of disagreement and suggests a high level of dissatisfaction with litigation.

The response for arbitration is much more ambiguous. Figure 16 indicates that nearly one third of the respondents disagree that **arbitration is a satisfactory procedure to resolve construction dispute**, 31.7% (disagree + strongly disagree) (23.3% + 8.4%).

Conversely, nearly another third agree, 31.2% (agree + strongly agree) (30.7% + 0.5%). The observed mean for this statement is 3.08 (SE mean 0.07) (95 % CI: 2.92 - 3.20), which indicates that there is no significant level of agreement or disagreement.

This is represented by a high level of neutrality about the satisfaction of arbitration as a procedure for resolving disputes (37.1%): This is an important factor and may be instrumental in the eventual growth of ADR. The construction industry is one of the chief users of arbitration²³ and clauses are built into most contracts. Despite the obvious dissatisfaction regarding the costs, time and adversarial nature of arbitration, this result demonstrates an indicative level of support for it, in comparison to litigation, where only 11.9% of the respondents regard the process as satisfactory. The neutral attitudes towards arbitration could be swayed in its favour, if the major flaws are eradicated or at least reduced by the 1996 Arbitration Act.²⁴ It is possible that the reforms of arbitration, when fully implemented, may influence this neutrality towards a more positive perception. The recent Woolf recommendations on civil reform, if implemented, have an upward battle to convert the low level of satisfaction with litigation into positive support.²⁵

The evidence from the follow-up interviews suggest that one concern with arbitration is the quality of arbitrators and the perception that the award is often split down the middle:

²³ Flood J. and Caiger A. (1993) op cit Hoare D.J. (1992) op cit

²⁴ Chapter 2 para. 3.3

²⁵ Woolf Final Report (1996) op cit. This is discussed in Chapter 2 paras 3.1.1 and 3.1.4 with an assessment of whether the recommendation, if implemented, will address the problems of the construction industry.

"I think the problem we find with arbitration in this country is purely and simply the quality of arbitrators, with obviously certain exceptions; it is not very good and in consequence it becomes more like pot luck. You might as well toss a coin rather than enter into what is becoming an extremely expensive process in this country. In fact, it is becoming so expensive in this country that there are serious risks that we will lose our international status as an arbitration centre." (Emphasis supplied)

The interviews provide some evidence to explain this support for arbitration. There is an implication that the interviewees believed that they have control over the identity of the arbitrator. This may make arbitration a more attractive proposition than litigation, as one contractor explained:

Whether it is a technical matter, a contractual matter or whatever, does colour the judgment as to what is the best way of getting it sorted and who you get to sort it. I mean, when we are going to arbitration, we have a certain interest in finding out who the arbitrator is going to be. Whether he has a commercial bias and looking at money or has a technical bias and looking at the complexity of the facts or whether he has a contractual bias and is looking at the strict interpretation of the contract. We might not always get our judgment right on that, but we certainly think that it comes into the equation." (Emphasis supplied)

The involvement in the choice of arbitrator (in contrast, there is no choice for litigation), together with the way that arbitration can be tactically used to indicate the level of commitment to the dispute, is a likely factor influencing the degree of satisfaction with the arbitration.

1.2 POSITIVE PERCEPTIONS ABOUT ADR.

Dissatisfaction with arbitration and litigation is a major factor in the potential development of the use of ADR. As discussed earlier, ADR is perceived to be quicker and less costly than the formal systems and less confrontational. The advantages of ADR are commended

in the literature²⁶ and the survey was designed to assess what perceptions main and sub/specialist contractors hold about ADR. A number of questions were asked about both its perceived advantages and disadvantages in resolving construction disputes. The statements focused on the following issues: the advantages of settling disputes when using ADR, the financial implications of using ADR, the advantages of participation in ADR and other general perspectives about ADR. The survey response to the beneficial attributes of ADR, which its proponents promote, are analysed first. The negative perceptions are appraised in chapter 5, in order to assess the effect they have on the choice of ADR in the dispute resolution process.

1.2.1 The advantages of settling disputes with ADR.

1.2.1.1 Settlement rate of ADR

The survey asked the respondents to estimate their level of agreement to the statement:
The settlement rate is high when using ADR.

Figure 17: The settlement rate for disputes is high when using ADR

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	2	57	131	7	4	201
%	1%	28.4%	65.2%	3.5%	2%	100%

*Cross-tabulation of the frequency and percentage for the survey response to the statement:
The settlement rate for disputes is high when using ADR.*

Figure 17 demonstrates that 65.2% of the survey are neutral to the statement that the settlement rate is high when using ADR. 29.4% (agree + strongly agree) (28.4% + 1%) of the respondents agree and only 5.5% disagree (disagree + strongly disagree) (3.5% + 2%). The observed mean is 2.77 (SE mean 0.04) (95% CI: 2.67 - 2.86), which indicates there is a significant level of agreement. Despite the level of agreement with this positive attribute of ADR, the interviewees and respondents did not comment extensively on this issue and a very high level of neutrality is recorded.

²⁶ See chapter 2 paras 5-5.1

1.2.1.2 ADR is good for multiple claims

The respondents were asked to rate their level of agreement to the statement: **ADR is good for multiple claims.** The criticisms of the formal systems have not centred around this attribute but it is one of the claims made about the advantages of ADR by its proponents.²⁷

Figure 18: ADR is good for multiple claims

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	3	46	127	16	5	197
%	1.5%	23.4%	64.5%	8.1%	2.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR is good for multiple claims.

Figure 18 shows that 64.5% of the respondents are neutral about the statement that **ADR is good for multiple claims.** The observed mean for this statement is 2.87 (SE mean 0.05) (95% CI: 2.76 - 2.94), which shows that there is a significant level of agreement but, as the null hypothesis is 3, it is noted that it is a weak significant level of agreement. The result demonstrates a substantial level of neutrality, which is comparable to the high level of neutrality expressed for the statement that the settlement rate for ADR is high when using ADR. (65.2%) (See figure 17) The interviews also reveal that there is a general lack of understanding about ADR and how it works. Often, interviewees did not know of the different procedures which are embodied in ADR and there were many references to the inability to make comments due to a general lack of knowledge and experience of it. Thus the likely cause of this neutrality is explained by a lack of detailed knowledge about the procedures. One specialist contractor who was interviewed began the interview by asking the question:

"What is ADR?"

²⁷ Some examples: Naughton P. (1990) op cit Ready J. (1991) ADR in Construction Disputes: Innovation in the 1990's Defense Counsel Journal October, Siedel G J(1992) op cit, Miles D. (1992) op cit.

Other respondents and interviewees admitted that they are not knowledgeable about ADR or that others in the industry are uninformed and, therefore, when in dispute with them, it is difficult to persuade them to use it:

"..well, it is a lack of knowledge from my point of view. It holds me back from saying yes to this and that is the problem. My knowledge on that subject (ADR) is so limited."

"We haven't had it proposed ever to us as a solution and I think we have only talked about it once. We made one serious proposal to use a mediator but it was rejected and I think it was rejected because they didn't really understand it. I spent a fair bit of time explaining how mediation works..... and we should end up with something suitable for both parties. I think it was rejected because they were frightened it was something new."

The qualitative data suggests that the respondents are not using ADR because they feel that do not have a full understanding of the procedures. This is considered in more detail below.²⁸

1.2.2 Financial implications of using ADR.

1.2.2.1 ADR saves management time

A frequent complaint made about the formal procedures are that they waste management time. The respondents were asked to assess their level of agreement with the statement **ADR saves management time**. The result again shows that when ADR is assessed in a quality for which arbitration and litigation are criticised as lacking, there is a strong positive response in agreement and the level of neutrality decreases.

²⁸ Chapter 4 section 4

Figure 19: ADR saves management time.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	32	90	52	23	3	200
%	16%	45%	26%	11.5%	1.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: ADR saves management time.

Figure 19 shows that 61 % (strongly agree + agree) (16% + 45%) of the respondents agree with the statement that **ADR saves management time**. The observed mean is 2.38 (SE mean 0.07) (95 % CI: 2.24 - 2.53), which is a significant level of agreement. This positive perception is confirmed by data from the interviews and many comments made by respondents on the necessity not to waste management resources in time wasting dispute resolution procedures.

"Tying down management time is very dangerous for specialist companies."

1.2.2.2 Legal costs in dispute resolution

One predominant concern about the costs of the formal procedures, which was uncovered in the literature and the indicator interviews,²⁹ is the resulting legal fees. The postal survey tested the perceptions of contractors about the costs of lawyers in ADR, by asking them to grade their response to the following statement: **Less money is spent on lawyers when using ADR**.

Figure 20: Less money is spent on lawyers when using ADR

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	61	96	34	6	3	200
%	30.5%	48%	17%	3%	1.5%	100%

Cross-tabulation of the frequency and percentage for the survey response to the statement: Less money is spent on lawyers when using ADR.

²⁹ See chapter 2 paras. 3.1.2 and 3.2.2 Barrett N. (1996) op cit (NEC survey of the "top 60" contractors on their attitudes to lawyers and their advice.

Figure 20 illustrates the level of concern held by the respondents about the costs of lawyers. 78.5% agree (strongly agree + agree) (30.5% + 48%) with the statement that **less money is spent on lawyers when using ADR**; this includes 30.5% who strongly agree. The observed mean is 1.97 (SE mean 0.06) (95% CI: 1.85 - 2.11), which is a significant level of agreement. Comments made in the survey, together with the follow-up interviews, illustrate the concern respondents have with the legal costs involved in both arbitration and litigation:

"Too much money is being syphoned off from the industry in legal fees which are wholly disproportionate to the amount of the dispute."

"...if you are going to issue a writ, you are stuck with a lawyer and not only do you have the solicitor but you have the barrister and the barrister's assistant, so you are in for the whole tribe....all at a very expensive rate per hour."

1.2.2.3 Resolving disputes without legal advisors.

This dissatisfaction with the legal involvement in dispute resolution was further tested in the postal survey. The respondents were asked whether they would consider resolving construction disputes without a legal advisor: Again, the response is emphatic.

Figure 21: Would you resolve a construction dispute without seeking advice from a legal advisor?

	Yes	No	Don't Know	Row Total
Frequency	154	44	13	211
%	73%	20.9%	6.2%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement: Would you resolve a construction disputes without seeking advice from a legal advisor?

73% of the respondents replied in the affirmative to the question: **Would you resolve a construction dispute without seeking advice from a legal advisor?** (Figure 21) The respondents were asked to make comments on their decision. When content analysis was

undertaken, a picture evolves of considerable dissatisfaction with the involvement of legal advisors in the construction industry. The predominant reason given for this emphatic response is the costs involving legal advisors. The comments and follow-up interviews support this result, as one contractor asserted:

"The main problem with most dispute resolution processes is the involvement of the law and the legal profession. Costs escalate sometimes out of all proportion to the dispute, non-issues become major stumbling blocks! ...We need a bold new resolution procedure which will not be hi-jacked by the legal profession".³⁰

This respondent's attitude echoes the view expressed in the literature³¹ and the indicator interviews: a new dispute procedure is needed but one which the legal profession does not control. The issue of the involvement of lawyers in the development of ADR and the perceptions of those surveyed to the potential hi-jacking of ADR by the legal profession is examined in Chapter 7.

There is a general feeling expressed by the respondents of the survey that the involvement of lawyers does not always benefit the parties to the dispute, nor aid its quick resolution. It must be noted, that although the respondents had stated they would settle disputes without legal advice, often, further comments were made that this would depend on the complexity of the dispute, intransigence of the other party and the nature of the dispute in question. A respondent stated that legal advisors are only involved if the dispute fails to settle with negotiation:

"On the basis that all disputes are eventually resolved, we would initially prefer to attempt a resolution through dialogue and open correspondence. Emphasis is on flexibility and reason. If progress looks unlikely, then we begin to seek formal advice and elevate our communication to a more formal level."

³⁰ See chapter 7 paras 4-4.11 Discussion on the samples response to statement lawyers will hijack ADR.

³¹ Davies R. (1992) op cit

The data from the respondents' comments and interviews support the findings that contractors would prefer to resolve disputes without involving legal advisors. However, this could depend on such issues as the amount in dispute, the other parties' insistence on using legal advisors or the need for a legal precedent to be made. Those respondents who stated that they would not resolve disputes without recourse to legal advisors believe that it is better to know one's legal position and that legal advice provides an analysis of the strengths and weaknesses of one's case. As one respondent asserted in the survey:

"Good legal advisers can give a more realistic appraisal of the strengths and weaknesses of the dispute, as they can see the wood through the trees and they have knowledge of similar case law history. They will assess also the likely outcome, with calculations of the likely cost involved and time to take to achieve a hearing." Emphasis supplied by the respondent.

1.2.2.4 ADR is a commercial settlement of dispute

One of the proposed advantages of ADR is that the final settlement is said to result from commercial decision rather than a legal decision. The survey asked the respondents to appraise their level of agreement to the statement: **ADR results in a commercial decision rather than a legal decision.**

Figure 22: ADR results in a commercial decision rather than a legal decision

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	30	124	39	5	2	200
%	15%	62%	19.5%	2.5%	1%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement: ADR results in a commercial decision rather than a legal decision.

Figure 22 shows that 77% (strongly agree + agree) (15% + 62%) of the respondents agree with the statement that **ADR results in a commercial decision**. The observed mean is 2.13 (SE .05) (CI: 95%, 2.02 - 2.23), which is a significant level of agreement. There is again a very low level of disagreement with the statement, 3.5%. (disagree +

strongly disagree) (2.5 % + 1 %). This finding supports the argument, that when ADR is compared to those areas where the formal systems are criticised, it creates a more positive response to ADR.³² The benefits of using ADR were stated in the following terms by one main contractor, who would consider using it:

"Usually, there is some merit in both sides of the arguments. If ADR allows this to be openly and 'fairly' discussed with both sides working to resolve the matter then this seems to me to be the commercial way forward, minimising legal costs which are never fully regained by other methods."

The interviewees and respondents, when commenting on the involvement of the legal advisors in construction disputes, are concerned that the legal professions (more so than claims consultants) are not in touch with the real issues facing construction. There is a view, which is expressed frequently, that the resolution of disputes does not rest with arguments on legal principles and that a commercial settlement is the preferred one:

"All the parties involved in a dispute must be aware of the commercial issues. Arguing over the niceties of a legal issue has no part in resolving construction disputes."

1.2.3 Participation and control over dispute resolution.

1.2.3.1 Participation in ADR

As noted above, the effect of the adversarial system is such that the parties to a dispute frequently feel that they have lost control over their own dispute and possible settlement. The proponents of ADR claim that one of its advantages is that it allows the parties to participate in the resolution of their own dispute, which, therefore, engenders greater satisfaction and control of the process.³³ The postal survey tested the respondents' level of agreement with the statement: **ADR allows you to participate more in resolving the dispute.**

³² Chapter 4 para. 1.1.6

³³ Some examples: Tyler T. (1988) op cit, Bevan A. (1992) op cit, O'Connor P. (1990) See chapter 2 paras. 5-5.1

Figure 23: ADR allows you to participate more in resolving the dispute.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	17	114	58	9	1	199
%	8.5 %	57.3 %	29.1 %	4.5 %	0.5 %	100 %

Cross-tabulation of frequency and percentage of response for the survey to the statement: ADR allows you to participate more in resolving the dispute.

Figure 23 shows that 65.8% (strongly agree + agree) (8.5 + 57.3) of those surveyed agree with the statement that **ADR allows you to participate more in resolving the dispute**. The observed mean is 2.31 (SE mean 0.05) (95% CI: 2.19 - 2.40), which represents a significant level of agreement. Nearly 30% are neutral, which is a trend exhibited in all the questions regarding the attributes of ADR, when the quality tested is one which the respondents perceive that the formal systems lack. This relatively high level of neutrality regarding the perception of ADR is explained as evidence of a lack of informed knowledge.³⁴ (High levels of neutrality are noted for the statements: **ADR is good for multiple claims** (64.5%) (Figure 18) and **The settlement rate is high when using ADR**. (65.2%) (Figure 17)). The low percentage of respondents, who disagree that ADR allows you to participate more in resolving the dispute, 5% (strongly disagree + disagree) (4.5% + 0.5%), suggests that the respondents do not, as yet, hold negative attitudes about participation in ADR. This can be contrasted with the frequent observations made by respondents and interviewees about their participation in the formal systems³⁵ and the role of the lawyers, who are perceived to take control of the procedures for their own benefit:

"Time and money become meaningless to all those involved but the real participants: the plaintiffs and the defendants." (emphasis provided by the respondent.)

A legally trained interviewee representing a large main contracting firm observed:

³⁴ Chapter 4 para. 1.1.6

³⁵ Chapter 4 paras. 1.1-1.1.7

"I think nowadays the legal profession has become much more of a business and I am afraid that one does get the impression, on some occasions, that a lot of people are running arbitration, and litigations for that matter, more for their own interests than perhaps their clients' interests. It is an impression that I know a number of people have."

1.2.3.2 Entrenchment of positions.

Frequently, it is suggested that the adversarial system forces the parties to become entrenched in their position by requiring them to adopt stances to support their arguments.³⁶ The survey asked the respondents to assess their level of agreement to the statement: **ADR relieves the effect of the parties becoming entrenched in their position.**

Figure 24: ADR relieves the effect of the parties becoming entrenched in their positions.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	9	112	68	7	4	200
%	4.5%	56%	34%	3.5%	2%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement: ADR relieves the effect of the parties becoming entrenched in their positions.

Figure 24 discloses that 60.5% (strongly agree + agree) (4.5% + 56%) of the survey respondents agree with the statement that **ADR relieves the parties from being entrenched in their positions.** The observed mean is 2.42 (SE 0.05) (95% CI: 2.31 - 2.52), which demonstrates that the respondents significantly agree. This attribute can be compared to the perceived effects of the adversarial systems, where, once the formal procedures are set in motion, the parties have to delineate their arguments and then defend them. A main contractor explained the problem once litigation or arbitration have commenced:

³⁶ Auerbach J. Justice Without Law (1983) *op cit* "Once an adversarial framework is in place, it supports competition and aggression to the exclusion of reciprocity and empathy,"

"...once the arbitration has started, once the writ has been served, everybody takes 5 steps back. Where you might be talking to your opponent beforehand, trying to think about resolving it, once the writ is out, you say, 'well, if that is your attitude, then I'm not going to accept'. It puts everybody several paces back. The adversarial scenario has arisen straight away and your lawyers will say, 'don't you dare speak to this chap again, I don't want you speaking to him and everything must go through me now.' And he writes nasty letters to his opponents and his opponents writes even nastier letters back and on you go."

In contrast, the respondents in the follow-up interviews perceive that ADR has positive advantages, if it used before the parties become entrenched in their positions:

"One of the situations is if something goes wrong and you can catch it before people get into entrenched positions and they haven't written dozens of letters to each other and put together huge quantities of evidence. You've got a chance."

"It must be a better way but needs to be introduced before parties become entrenched."

If the dispute can be caught before it has escalated into the formal procedures, the attitude held by some interviewees is that ADR may be advantageous. The warning is, if ADR is not used timeously, it may be too late. There is a time factor to be considered. The data from the survey and the follow-up interviews demonstrate that, at present, when a dispute arises, the parties begin to negotiate, but, when they fail to reach agreement, they consult solicitors and other legal advisors.³⁷ The data suggest that, at this stage, the opportunity to use ADR may have passed. The parties have become entrenched and attached to their arguments. If the industry itself becomes better informed about ADR, the advantages of using or proposing it earlier in the dispute will be recognised. That time is before legal advice is sought, because often before this stage the parties may have already tried and failed with negotiation. The parties may have already "lived" with the dispute for a long time and thus, become polarised in their position. This issue is examined in more detail

³⁷ See chapter 7

in chapter 7, when the perceptions of legal advisors are investigated. The research discloses that the parties to a dispute invest time and emotional energy in the process of reaching a solution, which is illustrated by the experience of one contractor:

"Yes, well, it is far more difficult because people have spent a lot of time getting the evidence together and the more you do it the more you believe in your own case..... You get more angry with the other side, the longer you look at your own case then it gets more difficult, in which case someone else has to adjudicate."

1.2.3.3 ADR is consensual

Participation in the dispute resolution process is dependent on the opposing party exhibiting a positive attitude to the need for settlement and being prepared to participate fully in the process. The criticism of the formal procedures is that they are used aggressively; either to force settlement, or take the dispute to a final adjudication, which is out of the hands of the parties. ADR, its proponents claim, is a consensual approach, which, therefore, enables the parties to continue their working relationship in the future.³⁸ The nature of construction is that many disputes arise when the work is still on-going and therefore the proponents of ADR claim that it is ideally suited to the construction industry,³⁹ as it enables the project to continue whilst the dispute is resolved. The respondents were asked to gauge their attitude to the statement: **ADR is a consensual approach to dispute resolution.**

³⁸ Some examples: Stephens R.J. (1992) op cit, Brown H. (1992) op cit, Bevan A. (1992) op cit. See chapter 2 para. 5.3 and 5.4

³⁹ Some examples: Stephens R.J. (1992) op cit, Brown H. (1992) op cit, Bevan A. (1992) op cit. See chapter 2 paras 5.3 and 4.4

Figure 25: ADR is a consensual approach to dispute resolution

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	13	126	52	7	1	199
%	6.5%	63.3%	26.1%	3.5%	0.5%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement ADR is a consensual approach to dispute resolution.

The results from figure 25 indicate that the respondents agree with the statement that **ADR is a consensual approach to dispute resolution**. 69.8% agree (strongly agree + agree) (6.5% + 63.3%) with the statement. The observed mean is 2.28 (SE mean 0.05) (95% CI: 2.17 - 2.36), which denotes a significant level of agreement. Once again, the characteristic which is attributed to ADR is not one that is commonly attributed to the formal systems and the results show that, in contrast, ADR is positively invested with a quality which the formal systems lack. (See figure 11, 13, and 14 where the results show that ADR is endowed with other qualities (speed and cheapness) which the formal systems lack.) The interviewees and survey respondents suggest ADR may be the appropriate forum when the parties have not personalised their arguments but, when one party to the dispute is not concerned with an on-going relationship or settling the dispute, it is not suitable or even considered. One interviewee stated that ADR is:

"Suitable only for "unfortunate" disputes between otherwise excellent trading partners who wish to continue trading notwithstanding the matter in contention and who, moreover, consider goodwill paramount to their relationship."

1.2.3.4 Compromise

The survey asked the respondents to state their level of agreement to the following statement: **ADR indicates compromise**.

Figure 26: ADR indicates compromise

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	8	86	70	32	3	199
%	4%	43.2%	35.2%	16.1%	1.5%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement: ADR indicates compromise.

The results from figure 26 show that nearly half the respondents agree with the statement that **ADR indicates compromise**, 47.2% (strongly agree + agree) (4% + 43.2%). However, there is a high level of neutrality (35.2%). The observed mean is 2.68 (SE mean 0.06) (95% CI: 2.56 - 2.80), which is a significant level of agreement. As discussed earlier, frequently the use of the formal systems of dispute resolution are seen as a sign of the seriousness of the argument.⁴⁰ Use of them is not perceived to be indicative of compromise. The respondents asserted that formal procedures are often commenced in order to force along a settlement and not in the spirit of compromise. The notion of compromise can have two different perceptions: one positive, in that the parties are willing to negotiate a settlement, which will be acceptable to both sides. The second is that it is a sign of weakness and the party has to compromise because the need for settlement is paramount.⁴¹ It is suggested, therefore, that there is some ambiguity about the meaning of this statement, which is reflected in the higher level of neutrality (35.2%) and the slightly higher level of disagreement (17.6%) than is reported for other statements about the advantages of ADR over the formal systems.

The data from the interviews and survey indicate that both views are prevalent. The view of one specialist contractor is that one of the probable dangers of using ADR is that the weaker party is forced to accept the compromise because of financial pressures:

⁴⁰ Chapter 4 para 1.1.5

⁴¹ Leeds C. (1992) The French Approach to Handling Conflicts and to Negotiating: Certain Notable Features Proceeding of the First International Construction Management Conference. UMIST

"ADR seeks to foreshorten the process, (probably) resulting in an unsatisfactory compromise by the weaker side or non-acceptance by the stronger. Thus, putting even more financial pressure on the weaker side who may then feel unable to pursue his rights under the formal procedures provided in the contract. He's exhausted and frustrated: the bully wins again!"

Generally, perceptions extracted from the comments made by the respondents and the interviewees are that compromise is viewed in the sense of a positive attribute and that ADR would be considered if both parties are prepared to compromise:

"Only if both parties were convinced that they were each of a mind to seriously negotiate, compromise and arrive at a settlement."

Thus, it is suggested, generally the respondents do not perceive compromise as a negative attribute. Where the parties are prepared to compromise, ADR is a more suitable forum for dispute resolution than the formal procedures. However, ADR may be viewed with suspicion by parties who are in a financially weaker position.

1.2.3.5 ADR is confidential

Proponents of ADR contend that it is confidential in nature and the parties to dispute can resolve their problems in private. Arbitration is, similarly, not a public forum for dispute resolution. The survey asked the respondents to rate their level of agreement to the statement: **ADR is confidential.**

Figure 27: ADR is confidential.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	5	59	119	15	1	199
%	2.5%	29.6%	59.8%	7.5%	0.5%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement: ADR is confidential.

The observed mean for the statement, **ADR is confidential**, is 2.74 (SE mean 0.05) (95% CI: 2.64 - 2.84), which indicates a significant level of agreement. Figure 27 shows there is a high response of neutrality for this statement (59.8%). As suggested earlier, the responses to the attributes of ADR, which compare favourably with the criticisms of formal systems, have produced a high level of agreement and here, where arbitration is endowed with confidentiality, the advantage of ADR being confidential may not be perceived as so remarkable.

1.2.3.6 ADR is flexible

Another suggested advantage of ADR is that it is flexible and the most appropriate procedures can be selected. Further, it is contended by the proponents of ADR that it is adaptable, in that the parties themselves can determine the format of their own procedures.⁴² Thus, for example, they can decide on the length of time for presentations of the arguments in a mediation and who is to give them. The parties can decide, if an ADR procedure does not reach a settlement, that they will accept the recommendation of the third party neutral.

The survey asked the respondents to grade their level of agreement to the statement: **ADR is flexible**.

Figure 28: ADR is flexible

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	7	92	99	1	1	200
%	3.5%	46%	49.5%	0.5%	0.5%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement: ADR is flexible.

Figure 28 shows a high level of neutrality with almost half of the respondents fitting into this category 49.5% and only 1% disagreeing (strongly disagree + disagree) (0.5% +

⁴² Some examples: Bevan A. (1992) op cit, Goldberg S. B. Green E.D. and Sanders F.E. (1985) op cit See chapter 2 paras. 5-5.1

0.5%) with the statement. The observed mean for the statement that **ADR is flexible** is 2.48 (SE mean 0.04) (95 % CI: 2.36 - 2.55), which is a significant level of agreement.

One interviewee who had used ADR described the advantage of its flexibility in a dispute:

"..all I know is that the thing about ADR generally is that there are no rules, so you can make it what you like. The ADR that we had, using mediation, we just made it up as we went along really. We said what we thought. They said what they thought. Then we retired into two separate rooms."

The flexibility of ADR is in direct contrast to the formal procedures of arbitration and litigation, which are regarded as rigid and procedurally bound. There is particular criticism of arbitration, which has 'slavishly' followed litigation.⁴³ These criticisms have recently been addressed by the 1996 Arbitration Act and the Woolf Report on Civil Justice. A detailed analysis is made in chapter 2 as to the effectiveness of the 1996 Arbitration Act and the proposals for reform for litigation, in order to assess the likely consequence on the development of ADR.⁴⁴ Arbitrators are now under a duty to adopt the most efficient procedures to achieve a fair tribunal without *"unnecessary delay and expense"*.⁴⁵ The respondents to the survey are largely neutral to the statement that **arbitration is satisfactory**⁴⁶ and, if the 1996 Arbitration Act is perceived by contractors to eradicate or minimise some of its problems which are causing dissatisfaction, it may influence contractors' choice of ADR. In contrast, the respondents are significantly in disagreement with the suggestion that **litigation is a satisfactory procedure**. Reforms of arbitration may do enough to prevail upon that dissatisfaction with arbitration. The potential reforms of litigation have a much harder task to alter its perceptions.

⁴³ DAC report (1996) op cit and chapter 2 para. 3.2-3.2.2

⁴⁴ Chapter 2 para 3.3-3.3.1

⁴⁵ Arbitration Act 1996, section 1(a) and 33(1) (b)

⁴⁶ Chapter 4 para. 1.1.7

This result regarding ADR's flexibility follows the general trend of the responses for positive attributes of ADR. Where the formal systems are perceived to be deficient in a quality, there is a significant level of agreement with the statements that ADR has this feature.⁴⁷ The follow-up interviews suggests that these positive perceptions are a reaction to the dissatisfaction with the formal procedures in these spheres. A sub/specialist contractor, who has little experience of ADR, expressed the view that, although he had no experience of ADR, it has to be preferable to either litigation or arbitration:

"Well, basically, I have had no dealings with it whatsoever. (ADR) So I have no preconceived view of it, but as an alternative to going to the law, then I will see it as a step forward. It would presumably be beneficial, because it will resolve the problem quicker and presumably cheaper."

1.2.4 ADR should be more formal

One suggestion in the indicator interviews and literature is that there is a need to put ADR on a more formal footing. This could be done in two ways: first, by introducing ADR clauses in contracts which would require the parties to attempt some ADR procedure before progressing to either arbitration or litigation and second, by making ADR binding. An analysis of the non-binding nature of ADR is made in chapter 5. The respondents were asked to estimate their level of agreement with the statement: **ADR should be put on a more formal setting.**

Figure 29: ADR should be put on a more formal setting.

	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
Frequency	9	59	88	41	3	200
%	4.5%	29.5%	44%	20.5%	1.5%	100%

Cross-tabulation of frequency and percentage of response for the survey to the statement: ADR should be put on a more formal setting.

⁴⁷ See appendix 4 which lists in ascending order the observed means for the level of agreement for the attitude statements.

Figure 29 shows that 44 % of the respondents are neutral towards the statement that **ADR should be put on a more formal setting**. The observed mean is 2.85 (SE mean 0.06) (95% CI: 2.75 - 3.01), which indicates that there is no significant agreement or disagreement. The respondents and interviewees commented on the perception that ADR should be put on a more formal footing in the context of using clauses in construction contracts or by making it binding. The comments evidenced some ambiguity on this issue. Some respondents believe that ADR will not be extensively used unless it is put into contracts and others do not wish to see a more formal approach: Thus, a respondent to the survey stated:

"I do not think ADR should be formalised in this way."

or:

"A more formal approach is preferable."

The results and the comments made suggest that there is no consensus amongst contractors on this issue. The question of putting ADR clauses into construction contracts is discussed later together with the analysis of the negative perceptions about ADR.⁴⁸

The results of the postal survey concerning the perceptions of arbitration and litigation reveal a picture of substantial dissatisfaction towards the formal systems, which is shared by most of the respondents. In comparison, the attitudinal questions about ADR, which contrast it with the formal systems, suggest that, on the major issues of costs and time and its non-confrontational nature, the respondents hold positive perceptions that it has the desired qualities missing in both arbitration and litigation. The findings suggest that many of the perceptions of the advantages of ADR, which its proponents have claimed, exist in the sector of contracting surveyed. However, the findings also expose a substantial lack of awareness about the more technical aspects of ADR. This is depicted in the high levels of neutrality on such issues as: the flexibility of ADR, its suitability for multiple claims

⁴⁸ Chapter 4 section 3 para. 3.1

and its high settlement rate. Section two explores any differences of responses between main contractors and sub/specialists and different sizes of organisation, in order to test the first hypothesis.

2 SECTION TWO

2.1 ANALYSIS OF DIFFERENCES IN GROUPS

This section analyses statistically the differences of responses between different groups in the survey, in order to test the first hypothesis. One objective of the indicator exercise had been to identify where disputes are most prevalent in the construction industry, in order to narrow the research. The indicator interviews revealed that there is a perception that disputes are most common between main contractors and sub/specialist contractors.⁴⁹ Therefore, this became the focus for the postal survey and interviews and forms the basis of two different groups for analysis. The theory which was developed is that, as main contractor and sub/specialist contractor would be in dispute with each other, it is necessary to compare their responses to the questionnaire, in order to assess whether there are any significant differences. If there are any significant differences, this would be likely to influence the potential development of the use of ADR.

It was proposed that the size of operation of contractors could be a relevant factor in the choice of dispute resolution procedure and it is surmised that the size of organisation, based on the "turnover size",⁵⁰ could affect the responses. This point is particularly important as one of the perceptions identified in the indicator exercise and literature is that ADR is only suitable for small disputes.⁵¹ It is probable that smaller operations are more likely to be involved in smaller sizes of disputes, which would be commensurate with the size of project in which the organisations are involved. This factor could be relevant in the decisions taken to use ADR. Thus each respondent was asked to give an estimate of their organisation's annual turnover and the survey population was then grouped by

⁴⁹ Chapter 3 para. 4.1.4

⁵⁰ Chapter 3 paras. 5.2.2-5.2.2.1

⁵¹ Chapter 2 para. 5.6.3

"turnover size" into large, medium and small categories.⁵²

2.1.1 Multivariate Analysis of Variance-Methodology of design.

Multivariate Analysis of Variance (MANOVA)⁵³ was the inferential statistical test which was applied to the item pool of attitude statement. The subjects were classified into three categories of turnover:

- (1) "Small" with a turnover of £6 million and under.
- (2) "Medium" with a turnover of more than £6 million but under £50 million and
- (3) "Large" with a turnover of £50 million and over.

The subjects were also classified into two categories of contracting organisation:

- (1) main contractor and
- (2) sub/specialist contractor.

The respondents were grouped by identifying the association list from which they were selected, and by self classification, through a question in the questionnaire as was explained in the methodology chapter.⁵⁴

Therefore, the design is a two-way multivariate factorial design with three levels of turnover and two categories of contractor. The null hypotheses are that "contractor type" and "turnover size" do not differ on the variables tested.

2.1.2 Attitude item pool

The attitude item pool contained statements about the formal systems of dispute resolution, the attributes of ADR in comparison to the formal systems, positive perceptions of ADR

⁵² Chapter 3 para. 5.2.2.1 and Appendix 1 Questionnaires

⁵³ Chapter 3 para. 7.5.2

⁵⁴ Chapter 3 paras. 5.2.2-5.2.2.1

and negative perceptions about ADR.⁵⁵ The MANOVA procedure was run on all the attitudes together in the item pool because they are grouped together in the questionnaire⁵⁶ and it was decided that it would have been artificial to separate them out into groups for testing. In order to report the finding clearly, it was decided to discuss the data under three headings.

Sub-section 1: Statements concerning the attitudes towards the formal systems and the comparative perceptions of ADR.

Sub-section 2: Perceived positive attributes of ADR.

Sub-section 3: Perceived negative attributes of ADR. (Reported in chapter 5)

The MANOVA procedure on SPSS 6.0.1 for Windows produces 4 test criteria: Pillais, Wilks, Hotellings and Roys.⁵⁷ The most robust criterion is Pillais, because its significance level is *"reasonably correct even when the assumptions are violated."*⁵⁸ Therefore, the statistical test result reported is Pillais' criterion.

2.1.3 Post hoc testing

When statistically significant test results were given for the effect of "turnover size" on a variable, the effect was then tested with the Scheffé post hoc multiple comparison procedures to determine which sub-groups' means differed from the others.

When a statistically significant result is given in this section for the effect of "contractor type" on a variable, the means for main contractor and sub/specialist contractor are analysed and a cross-tabulation is done in order to assess where the difference lies.

⁵⁵ Appendix 1. Questionnaires

⁵⁶ Appendix 1 Questionnaires

⁵⁷ Norusis M.J. (1993) (SPSS for Windows Advanced Statistics) op cit

⁵⁸ Norusis M.J. (1993) (SPSS for Windows Advanced Statistics) op cit

2.1.4 Testing of effects

As the design is a two by three factorial (two types contractors and three categories of turnover), three effects were tested on the dependent variables:

- (1) interaction between "contractor type" by "turnover type"
- (2) the effect of "contractor type"
- (3) the effect of "turnover size".

The SPSS Manova procedure gives a separate test output for each effect and for each individual variable for that effect.

2.2 RESULTS OF MANOVA PROCEDURE ON THE COMPLETE ITEM POOL OF ATTITUDES.

The MANOVA procedure was run on all the attitude statements in the complete item pool. First, the test results for the three effects on all the attitude statements in the item pool are discussed. Then the effects on the three separate sub-sections of attitudes, described above are discussed. (Dissatisfaction with the formal systems and comparative attitudes towards ADR, perceived positive perceptions about ADR and, finally, the negative perceptions, which are discussed in chapter 5.)

2.2.1 Interaction between "contractor type" by "turnover size"

When the MANOVA procedure was run on the attitude statements in the complete item pool, the test statistic for the interaction between "turnover size" and "contractor type" is ($F = 0.93$; $df = 74/248$; $p > 0.05$). The objective of the test is to ascertain whether there is a main effect between the independent variables of "contractor type" by the "turnover size" on the dependent variables (attitude statements). There is no interaction between "contractor type" by "turnover size".

2.2.2 Effect of "contractor type"

The observed significance level for the effect of "contractor type" on the dependent variables is ($F = 1.12$; $df = 37/123$; $p > 0.05$). The test statistic indicates that there is no statistically significant effect of "contractor type" on the dependent variables. The

test, however, did indicate that there are some statistical differences on individual variables which are reported. These are discussed in the relevant sub-headings where the attitude statement occurred.

2.2.3 Effect of "turnover size"

The result of the MANOVA test on the item pool was that the observed significance level for the effect of "turnover size" on the dependent variables is ($F = 1.43$; $df = 74/ 248$; $p = 0.022$). The test statistic indicates that there is a statistically significant effect of "turnover size" on the dependent variables at the 0.05 level of probability. The variables where the effect of turnover showed a significant difference at the 0.05 level and those where there is a trend at the 0.10 level are discussed in the three sub-sections.

2.2.4 Summary of the results of the MANOVA test

There is no significant interaction between "contractor type" by "turnover size" on the attitude statements. There is also no statistical difference in "contractor type". However, there is an effect of "turnover size". This suggests that the group differences in attitudes towards the formal systems and ADR are significantly more likely to be affected by "turnover size" than by "contractor type".

2.3 DIFFERENCES IN GROUP EFFECTS ON ATTITUDES TO THE FORMAL SYSTEMS AND COMPARATIVE PERCEPTIONS OF ADR.

Section 1 reported the findings of the survey population towards the attitude statements regarding the formal systems of dispute resolution and the comparative perceptions of ADR to the formal systems, which are stated below;

Attitude to formal systems:

There is a need to move away from the adversarial approach.

Construction industry disputes need a quick decision.

Litigation costs too much.

Arbitration costs too much.

Arbitration is a satisfactory procedure to resolve dispute.

Litigation is a satisfactory procedure to resolve dispute.

Comparative perceptions of ADR:

ADR is cheaper than formal dispute resolution.

ADR is less threatening than a court of law.

ADR is less threatening than arbitration.

ADR is a quicker method to reach settlement than litigation.

ADR is a quicker method to reach settlement than arbitration.

ADR is less confrontational than the formal systems of dispute resolution.

The findings of the total survey population is that there is a significant level of dissatisfaction about the formal systems of dispute resolution held by the survey population. Further, the findings reveal that the respondents hold positive perceptions about ADR when the attributes tested could be compared to the formal systems. Thus there is a high level of agreement that ADR is quicker, less expensive, less threatening and less confrontational than either arbitration or litigation. Where the perceptions of ADR are not concerned with the ascribed criticisms of ADR, the respondents report higher levels of neutrality. The contention of this analysis is that, where ADR may be compared favourably to the formal systems, a more optimistic and positive attitude towards ADR is discernible. Where there is no direct comparative element, the response reveals a higher measure of neutrality, which reflects a lack of awareness and knowledge about the potential attributes of ADR. This lack of knowledge is one factor which influences the choice of ADR and is a likely cause of infrequency of its use.⁵⁹

This section considers if there is any significant differences in the three effects of "contractor type" by "turnover size", "contractor type" and "turnover size" on the attitude statements about the formal systems and the comparative perceptions of ADR.

2.3.1 Interaction between "turnover size" by "contractor type" on attitudes to the formal systems and comparative perceptions about ADR.

As stated above, the MANOVA test statistic for the interaction between "turnover size" by "contractor type" indicates that there is no statistically significant effect on the attitude

⁵⁹ Chapter 4 para 3.2

statements about the formal systems and comparative perceptions about ADR.

2.3.2 Effect of "contractor type" on attitudes to the formal systems and comparative perceptions about ADR.

As stated above, the MANOVA test statistic for the effect of "contractor type" on the item pool of statements indicates that there is no significant difference. There are statistically significant differences at the 0.05 level on two individual variables, which are reported: **ADR is cheaper than the formal systems of dispute resolution** and **Construction disputes need a quick decision**. On these two attitude statements, there is a difference in response between "contractor type".

(i) ADR is cheaper than formal dispute resolution.

The individual Manova test statistic for the variable **ADR is cheaper than the formal systems** is ($F = 4.87$; $df = 1/159$; $p = 0.029$), which indicates that there is a significant difference at the 0.05 level for "contractor type" on the dependent variable.

Figure 30: ADR is cheaper than formal systems of dispute resolution by "contractor type".

Frequency Row %	Strongly agree	agree	neutral	disagree	strongly disagree	Row total
Main contractor	29 26.6%	55 50.5%	22 20.2%	2 1.8%	1 0.9%	109
sub- contractor	16 17.8%	39 43.3%	32 35.6%	3 3.3%	0 0.0%	90
Column Total	45 22.6%	94 47.2%	54 27.1%	5 2.5%	1 0.5%	199 100%

Cross-tabulation of frequency and percentage of response for main contractors and sub/specialist contractors for the statement: ADR is cheaper than formal systems of dispute resolution.

Figure 30 shows that 77.1% (strongly agree + agree) (26.6% + 50.5%) of main contractors agree that **ADR is cheaper than the formal systems of dispute resolution**, in comparison to 69.8% (17.8 + 43.3) (strongly agree + agree) of sub/specialist contractors. The observed mean for main contractors is 1.96 (95% CI: 1.80 - 2.13),

which is a very high significant level of agreement. The mean for sub/specialist contractors is 2.31 (95% CI: 2.13 - 2.50), which is a significant level of agreement. Main contractors are significantly more in agreement with the statement than sub/specialist contractors. This difference is one of level of agreement rather than of opinion. It is unlikely to be detrimental to the development of the use or choice of ADR by either type of contractor.

(ii) Construction disputes need a quick decision

The Manova test statistic for the dependent variable: **Construction disputes need a quick decision**, is ($F = 4.92$; $df = 1/ 159$; $p = 0.028$), which is significant at the 0.05 level. There is a significant effect of "contractor type" on the dependent variable.

Figure 31: Construction disputes need a quick decision.

Frequency Row %	Strongly agree	agree	neutral	disagree	strongly disagree	Row total
Main contractor	32 29.1 %	64 58.2 %	11 10 %	2 1.8 %	1 0.9 %	110
Sub- contractor	41 44.1 %	45 48.4 %	6 6.5 %	1 1.1 %	0 0 %	93
Column Total	73 36 %	109 53.7 %	17 8.4 %	3 1.5 %	1 0.5 %	203 100 %

Cross-tabulation of frequency and percentage of response for main contractors and sub/specialist contractors for the statement: Construction Industry disputes need a quick decision.

Figure 31 clearly indicates the level of concern that sub/specialist contractors have with the issue of the need for a quick decision in the construction industry, as 44.1% strongly agree with the statement, in comparison to 29.1% of main contractors. The observed mean for sub/specialist contractors is 1.64 (95% CI: 1.51 - 1.78), which is a very high significant level of agreement. The mean for main contractors is 1.87 (95% CI: 1.73 - 2.01), which is a significant level of agreement. This finding, together with the MANOVA test statistic for this variable, indicates that sub/specialist contractors significantly agree more with this statement than main contractors, but this is not a

difference of opinion. This is an issue with which sub/specialist contractors are extremely concerned and this is confirmed by comments made by interviewees and respondents. The difficulty experienced by sub/specialist contractors is that excessive delay can result in either the organisation going out of business or having to give up the dispute because of costs involved in continuing:

"the longer they (main contractors) can string it out, they hope that the sub-contractor will go away. Talking from the sub-contractors point of view, the cost of the thing going on is getting more and more prohibitive."

The difference reported is unlikely to affect adversely the choice of ADR by contractors, but sub/specialists are more likely to be negatively influenced against the formal systems.

2.3.3 Effect of "turnover size" on perceptions of the formal systems and comparative perceptions of ADR.

The MANOVA test statistic for the effect of "turnover size" on the attitude statements about the formal systems and comparative perception about ADR is ($F = 1.43$; $df = 74/248$; $p = 0.022$), which is statistically significant at the 0.05 level. Thus there is a significant effect of the "turnover size" on the dependent variables. When the individual test statistic is inspected for each statement, two variables are identified, where there is a significant difference at the 0.05 level: **ADR is less threatening than arbitration** and **Arbitration costs too much**. Two more variables have significant test results at the 0.10 level of significance, which are reported as a trend: **Litigation costs too much** and **Litigation is satisfactory**. On these variables, organisations with different sizes of turnover respond differently.

(i) ADR is less threatening than arbitration

The Manova test statistic for the statement **ADR is less threatening than arbitration** is ($F = 5.22$; $df = 2/159$; $p = 0.006$). This is a statistically significant result at the 0.05 level of significance, which indicates that there is an effect of "turnover size" on this variable. When the post hoc Scheffé test was performed, it indicates that the largest turnover category (£50 million and over) significantly differs in its response, at the 0.05

level, from both the other two turnover groups. This group significantly agrees more with the statement that ADR is a less threatening forum than arbitration.

Figure 32: Cross-tabulation turnover and ADR is a less threatening forum than arbitration.

Frequency %	strongly agree	agree	neutral	disagree	strongly disagree	Row total
£6 million-	1 3.6%	51 62.2%	28 34.1%	2 2.4%		82
£50 million-	1 1.9%	32 62.5%	16 30.8%	3 5.8%		52
£50 million+	6 13%	33 71.7%	7 15.2%	0 0%		46
Column total	8 4.4%	116 64.4%	51 28.3%	5 2.8%		180 100%

Cross-tabulation of frequency and percentage for "turnover size" for the statement: ADR is less threatening than arbitration.

Observation of figure 32 demonstrates that 84.7% (strongly agree + agree) (13% + 71.7%) of the respondents from the "turnover size" of £50 million and over agree that ADR is less threatening forum than arbitration. The observed mean for this group is 2.02 (95% CI: 1.86 - 2.18), which is a significant level of agreement. The observed mean for respondents with a turnover of under £50 million but over £6 million is 2.40 (95% CI: 2.23 - 2.50) and for respondents with a turnover of £6 million and under, it is 2.38 (95% CI: 2.26 - 2.50), which are all significant levels of agreement. There is a notable difference in the percentages of respondents from each turnover group, who are neutral to this statement. 15.2% of the largest turnover category are neutral, compared with 30.8% and 34.1% for the other two groups. All three groups of "turnover size" agree that ADR is a less threatening forum than arbitration, but respondents from the largest turnover category agree significantly more. This is a difference in level of agreement rather a difference of opinion. This difference is unlikely to affect the choice of ADR by this "turnover size", but is more likely to affect the choice of arbitration.

The follow-up interviews confirm the findings that arbitration is a threatening forum of

dispute resolution and many interviewees recounted their organisation experiences with the procedure.⁶⁰ There is no indication in the interview data as to why the largest contracting group should show a significant level of difference from the other two turnover categories. However, larger contractors may more often be in conflict with contractors and with other entities, such as clients.⁶¹ This may produce more experience of arbitration. It is also entirely possible that the smaller groups have to settle disputes before they reach arbitration, whereas the larger contracting groups may have to go through the whole procedure more often and this may be with the client and or professionals involved in the dispute, who will often have insurance, which supports their action.

(ii) Arbitration costs too much

The MANOVA test statistic for the effect of "turnover size" on the variable **arbitration costs too much**, is ($F = 3.36$; $df = 2/159$; $p = 0.037$) which is significant at the 0.05 level and indicates that there is a significant effect of "turnover size". When the post hoc Scheffé test was performed, no two groups are significantly different at the 0.05 level. The survey population⁶² agree that arbitration costs too much and no turnover group significantly differs at the 0.05 level in this perception.

⁶⁰ Chapter 4 paras. 1.1.1-1.1.2 and 1.1.4-1.1.5 and 1.1.7

⁶¹ A further complication may be that the client is involved in either litigation or arbitration with a professional, eg for negligent supervision, as well as the main contractor for defective construction.

⁶² Chapter 4 para 1.1.4

Figure 33: Arbitration costs too much by "turnover size".

Frequency %	strongly agree	agree	neutral	disagree	strongly disagree	Total
£6 million-	28 33.3 %	32 38.1 %	22 26.2 %	1 1.2 %	1 1.2 %	84 43.8 %
-£50 million	32 54.2 %	16 27.1 %	9 15.3 %	2 3.4 %	0 0 %	59 30.7 %
£50 million+	23 46.9 %	21 42.9 %	4 8.2 %	1 2 %	0 0 %	49 25.5 %
Column total	83 43.2 %	69 35.9 %	35 18.2 %	4 2.1 %	1 0.5 %	192 100 %

Cross-tabulation of frequency and percentage for "turnover size" for the statement: Arbitration costs too much.

Although the Scheffé test indicates that no groups are significantly different at the 0.05 level, it is of interest that 54.2 % of the group with a turnover of under £50 million but over £6 million strongly agree with the statement that **arbitration costs too much**. (See figure 33) The observed means for the survey population is 1.80, which is a significant level of agreement with the statement.⁶³ The reported observed mean for the three groups are: For turnovers of £6 million and under, it is 1.99 (95 % CI: 1.80- 2.18). For turnover group under £50 million but over £6 million, it is 1.68 (95 % CI: 1.45 - 1.90). For turnover group £50 million and over, it is 1.65 (95 % CI: 1.45 - 1.86). All three significantly agree with the statement that arbitration costs too much, but is observable that the two largest groups agree more than the smallest turnover group. This result, as noted above, may be because the larger contracting groups are more likely to go through a completed arbitration and are more likely to be in disputes with parties other than contracting organisations. This difference is unlikely to affect the choice of ADR by the two largest turnover groups, but is more likely to affect negatively their choice of arbitration.

⁶³ Chapter 4 para. 1.1.4

(iii) **Litigation costs too much**

The MANOVA test statistic is ($F = 0.252$; $df = 2/ 159$; $p = 0.084$) for the variable **Litigation costs too much**, which is not significant at the 0.05 level, but it is of interest as it indicates a trend at the 0.10 level. When the post hoc Scheffé test was performed, no two groups are significantly different at the 0.05 level. The survey population significantly agree⁶⁴ that litigation costs too much and no turnover group differs at the 0.05 level in this perception.

Figure 34: Litigation costs too much by "turnover size".

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Total
£ 6 million-	45 53.6%	31 36.9%	7 8.3%	0 0%	1 1.2%	84 44.0%
- £ 50 million	43 74.1%	11 19%	3 5.2%	1 1.7%	0 0%	58 30.4%
£ 50 million+	27 55.1%	19 38.8%	2 4.1%	1 2%	0 0%	49 25.7%
Column total	115 60.2%	61 31.9%	12 6.3%	2 1%	1 0.5%	191 100%

Cross-tabulation of frequency and percentage for "turnover size" for the statement: Litigation costs too much.

Although the Scheffé test indicates that no two groups are significantly different at the 0.05 level, it is notable that 74.1% of respondents with a turnover of under £50 million but over £6 million, which is the middle category, record a high level of strong agreement with the statement that **litigation costs too much**. (See figure 34) Figure 33 shows that 54.2% of this group strongly agree that arbitration costs too much. The observed means for the turnover group of £6 million and under is 1.58 (95% CI: 1.42 - 1.75). For the group with a turnover of under £50 million but over £6 million, it is 1.34 (95% CI: 1.17 - 1.52) and for turnover group £50 million and over, it is 1.53 (95% CI: 1.34 - 1.72) All three groups significantly agree that litigation costs too much but the respondents in the middle turnover category agree more strongly than the other two groups. The interview

⁶⁴Chapter 4 para. 1.1.4

and survey data did not reveal any reason why the middle size of organisations agree more with this statement. This difference is unlikely to affect the choice of ADR by this group, but is more likely to affect adversely their choice of litigation.

(iv) Litigation is a satisfactory procedure for resolving construction dispute.

The MANOVA test statistic for the variable **litigation is satisfactory** is ($F = 2.76$; $df = 2/159$; $p = 0.067$), which is not significant at the 0.05 level, but is reported as it indicates a trend at the 0.10 level of significance. When the post hoc Scheffé test was performed, the group with a turnover of £50 million and over is significantly different at the 0.05 level from the group with a turnover of £6 million and under. Respondents in the largest turnover group disagree significantly more that litigation is a satisfactory procedure for resolving construction disputes, than respondents in the smallest turnover group.

Figure 35: Cross-tabulation categories of turnover by Litigation is satisfactory procedure for resolving dispute.

Frequency %	strongly agree	agree	neutral	disagree	strongly disagree	Row total
£6 million-	0 0%	2 2.4%	21 25.3%	38 45.8%	22 26.5%	83
£ 5 0 million-	1 1.7%	11 18.6%	12 20.3%	22 37.3%	13 22%	59
£ 5 0 million+	1 2%	8 16.3%	16 32.7%	18 36.7%	6 14.6%	49
Column total	2 1%	21 11%	49 25.7%	78 40.8%	41 21.5%	191 100%

Cross-tabulation of frequency and percentage for "turnover size" for the statement: Litigation is a satisfactory procedure for resolving disputes.

Figure 35 shows that 72.3% (disagree + strongly disagree) ($45.8\% + 26.5\%$) of respondents, with a turnover of £6 million and under, disagree with the statement that **litigation is a satisfactory procedure for resolving disputes**, in comparison to 51.3% (disagree + strongly disagree) ($36.7\% + 14.6\%$) of the respondents with a turnover of £50 million and over. The reported observed mean for the survey population to this

statement is 3.68 (SE mean 0.07),⁶⁵ which indicates that there is a significant level of disagreement with the statement that litigation is a satisfactory procedure. The reported mean for respondents with turnovers of £50 million and over is 3.40 (95% CI: 3.13 - 3.69). The mean for respondents with a turnover of under £50 million and over £6 million is 3.59 (95% CI: 3.31 - 3.88) and for respondents with a turnover of £6 million or less, it is 3.96 (95% CI: 3.79 - 4.14). The Scheffé test and the cross-tabulation table indicate that the smallest turnover category disagree more strongly than the largest turnover group of contractors with the statement that **litigation is a satisfactory procedure for resolving construction disputes**. This is a difference in level of disagreement rather than a difference of opinion.

The major problems of time and cost are of critical concern to the respondents, as evidenced by their comments.⁶⁶ There is support for the submission that the group least likely to benefit from litigation is the smallest category of turnover, who may find the costs of litigation are prohibitive. Often, for the smallest organisation, which finds itself in dispute, the major concern is to receive payment for work done. The respondents and follow-up interviewees commented that the time involved in reaching a settlement could result in the smaller organisation going out of business. Thus it is suggested that the smallest size of contractor would find that litigation is more unsatisfactory than do the larger organisations, who may have more time and resources.

The follow-up interviews and the survey comments support the findings that there is general agreement that litigation is an unsatisfactory procedure. There is also evidence to suggest that litigation can be used only by those who have the money to back up their arguments. A main contractor who was interviewed perceived litigation as a 'game of poker', which the party with the greater resources and nerves is likely to win:

"...it may be pure tactics at the moment...I mean a lot of Court actions are...It's a poker game isn't it? It's who is prepared to or who has the guts. When you actually have the

⁶⁵ Chapter 4 para. 1.1.7

⁶⁶ See chapter 4 section 3 paras. 3-3.2

nerve and are prepared to go to court, you do frighten people but you have to have big bucks behind you."

2.3.4 Summary of the effect of "contractor type" and "turnover size" on the dissatisfaction with the formal systems and comparative perceptions of ADR.

The results of the MANOVA test on the effect of "contractor type" on the attitudes held towards the formal systems of dispute resolution and the comparative perceptions of ADR are that there is a high level of agreement by main contractors and sub/specialist contractor on these attitudes. However, on two variables, there is a discernable difference in strength of agreement. Main contractors agree significantly more strongly than sub/specialists that **ADR is cheaper than the formal systems**. Sub/specialist contractors agree significantly more strongly than main contractors with the statement that **construction industry disputes need a quick decision**.

The findings for the total survey population hold true for both main contractors and sub/specialist contractors. There is a significant level of dissatisfaction with the formal systems and both main and sub/specialist contractors hold positive perceptions about ADR when its qualities are compared to arbitration and litigation. There is a significant level of dissatisfaction with both litigation and arbitration which is held by both sectors of contracting. Further, there is a significant level of agreement that ADR is cheaper, quicker, less threatening and less confrontational than the formal systems. Both groups agree that there is a need to move away from the adversarial system, which is the procedure adopted by the formal systems. Any differences which are detected by the statistical tests, are ones of degree of agreement, rather than opinion.

The MANOVA test indicates that there is a significant effect of "turnover size" on the independent variables. When the tests for the individual variables were investigated, there is a significant effect at the 0.05 level of "turnover size" on two variables: (i) **ADR is less threatening than arbitration** and (ii) **Arbitration costs too much**. Two more variables are reported at the 0.10 level, as they may indicate a trend: **Litigation costs too**

much and **Litigation is satisfactory.**

The Scheffé test reveals that all three turnover groups agree that ADR is a less threatening forum than arbitration, but the largest turnover group agree significantly more with the statement at the 0.05 level. It is suggested that larger contractors may have had more negative experiences with arbitration than other contractors and these disputes may be with other entities, such as clients. This difference is unlikely to affect the choice of ADR, but may affect the choice of arbitration by contractors with a turnover of £50 million and more.

The Scheffé test indicates that there is a significant difference at the 0.05 level between the smallest and largest turnover categories of contractors over the statement: **Litigation is a satisfactory procedure.**⁶⁷ The smallest turnover group (£6 million and under) agree more than the largest category (£50 million and over) with the statement. Data from the follow-up interviews and respondents suggest that the time and costs involved in reaching a settlement are of primary concern and that smaller organisations may be unable to resource litigation. This difference is again in level of agreement rather than attitude and is unlikely to affect adversely the development of ADR, but may affect the choice of litigation by the smallest turnover group.

Although there are indications that there are differences between categories of "turnover size" on the costs of litigation and arbitration, when post hoc tests were performed no two groups are significantly different at the 0.05 level. The differences in these two variables are reported as trends and it is of interest that respondents in the middle "turnover size" (under £50 million and over £6 million), record a high percentage of strong agreement with the statements regarding the costs of both the formal systems of dispute resolution. This high level of agreement, that the formal systems cost too much is unlikely to

⁶⁷ The MANOVA test statistic was reported at a 0.10 level of significance as a trend. This result was checked with the non parametric test, Kruskal-Wallis test. (Chi-Square 9.12, df = 2, p = 0.0105), which is significant at the 0.05 level. When this is corrected for ties the result is (Chi-Square 10.0859, df=2: p = 0.0065), which is significant at the 0.05 level.

influence the choice of ADR negatively, but more probably will affect adversely the choice of the formal systems.

Any differences which exist between turnover groups are in the level of agreement or disagreement with the statements, rather than differences of opinion. It is not believed that these differences are likely to influence the choice of ADR adversely, but they may affect the choice of the formal systems.

2.4 DIFFERENCES OF GROUP EFFECTS ON PERCEIVED ADVANTAGES OF ADR

The findings of the total survey population on the positive perceptions of ADR were reported earlier. The respondents were tested on the following statements:

The settlement rate for dispute is high when using ADR.

ADR is good for multiple claims.

ADR saves management time.

Less money is spent on lawyers when using ADR.

ADR is a commercial settlement decision rather than a legal decision.

ADR allows you to *participate more in resolving dispute*.

ADR relieves the effect of the parties *becoming entrenched in their positions*.

ADR is a consensual approach to dispute resolution.

ADR indicates compromise.

ADR is confidential.

ADR is flexible.

ADR should be put on a more formal setting.

The results suggest that the total survey population hold many of the positive perceptions about ADR, which are claimed by its proponents, but the survey also exposes substantial lack of awareness on the more technical aspects of ADR, which is supported by the evidence from the interviews and the high levels of neutrality on such issues as the

flexibility of ADR, its suitability for multiple claims and its high settlement rate.⁶⁸

The following sections consider whether there is any significant interaction between "contractor type" by "turnover size", effect of "contractor type" or effect of "turnover size" on the perceived positive advantages of ADR.

2.4.1 Interaction between "contractor type" by "turnover size" on the positive perceptions about ADR.

As stated above, the MANOVA test statistic for the interaction between of "turnover size" and "contractor type" shows that there is no significant interaction at the 0.05 level on the statements in the item pool.⁶⁹ When the individual test statistics for the positive statements about ADR are examined, no statements are significant at the 0.05 level, but one statement is reported, as it indicates a trend up to the 0.10 level. The test statistic for the statement **ADR is confidential** is ($F = 2.61$; $df = 2/ 159$; $p = 0.077$). There is a difference in response for "contractor type" with different "turnover sizes" to the statement that ADR is confidential, which is significant at the 0.50 level. In order to discover where this difference lay, a multiway table⁷⁰ of means for each sub-group is given below.

⁶⁸Chapter 4 paras. 1.2 -1.2.4

⁶⁹Chapter 4 section 2 para. 2.2.1

⁷⁰ A multiway table is a table which shows more than two factors. eg turnover factor, contractor factor and the variable "ADR is confidential."

Figure 36: Multiway table of "turnover size" by "contractor type" by ADR is confidential

"Turnover size"	Main/sub-contractor		Group total Mean
	Main contractor	Sub-contractor	
	Mean	Mean	
£6 million -	2.68	2.84	2.77
£6 million + to £50 million	2.77	2.69	2.74
£ 50 million +	2.55	3.10	2.67
Group total	2.66	2.82	2.73

Multiway table of means for "contractor type" by "turnover size" and the groups means for the statement: ADR is confidential.

When the body of the multiway table (figure 36) is interpreted, it indicates that the interactive effect of "contractor type" by "turnover size" exists at the largest turnover group (£50 million and over). The observed mean for main contractors in the largest turnover category is 2.55, which suggests that they are in agreement with the statement that ADR is confidential. In comparison, the observed mean for sub/specialist contractors in the largest category of turnover is 3.10, which suggests they are more in disagreement with this statement. This sub-group noticeably displays a difference of opinion from all the other groups, who are in agreement with the statement. This result denotes a lack of confidence in ADR by sub/specialist contractors with a turnover of £50 million and over in the area of the confidentiality of ADR. The interviews and questionnaires provided no evidence to explain why there is a difference by of opinion or to explain this lack of confidence by this group. However, this opinion could reflect adversely on the choice of ADR by sub/contractors with a turnover of £50 million and over.

2.4.2 Effect of "contractor type" on the positive perceptions about ADR.

As stated above, the MANOVA test statistic for the effect of "contractor type"⁷¹ shows

⁷¹ Chapter 4 section 2 para. 2.2.2

there is no significant effect at the 0.05 level. There is no overall effect of "contractor type" on the positive perceptions of ADR. There are individually statistically significant differences on three variables at the 0.10 level which are reported as a trend: **ADR saves management time**, **ADR is confidential** and **ADR should be put on a more formal setting**. There is a significant difference, at the 0.10 level, between main contractors and sub/specialist contractors on these three statements. In order to discover what the difference is, the means and percentages of each groups are considered.

(i) **ADR saves management time.**

The Manova test statistic for the effect of contractor on the variable **ADR saves management time** is ($F = 3.21$; $df = 1/ 159$; $p = 0.075$), which indicates a trend at the 0.10 level of significance.

Figure 37: ADR saves management time by "contractor type".

Frequency Row %	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Main contractor	20 18.3 %	52 47.7 %	26 23.9 %	9 8.3 %	2 1.8 %	109 54.5 % %
sub- contractor	12 13.2 %	38 41.8 %	26 28.6 %	14 15.4 %	1 1.1 % %	91 45.5 %
Column Total	32 16 %	90 45 %	52 26 %	23 11.5 % %	3 1.5 %	200 100 %

Cross-tabulation of frequency and percentage of response for main contractors and sub/specialist contractors for the statement: ADR saves management time.

Figure 37 demonstrates that there is a considerably higher level of agreement by main contractors than sub/specialist contractors for the statement that **ADR saves management time**. 66% of main contractors agree, (strongly agree + agree) (18.3% + 47.7%), compared to 55% (strongly agree + agree) (13.2% + 41.8%) for sub/specialists. The observed mean for the survey population is 2.37, which indicates a significant level of agreement.⁷² The observed mean for main contractors is 2.27 (95% CI: 2.10 - 2.45) and

⁷²Chapter 4 section 1 para. 1.2.2.1

for sub/specialist contractors it is 2.49 (95 % CI: 2.27 - 2.69), which implies that there is a high level of agreement from both sectors, but main contractors agree more strongly than sub/specialists. This is not a difference of opinion, but a difference in level of agreement. It is unlikely to affect the choice of ADR adversely, but indicates stronger support by main contractors for this aspect of ADR.

(ii) ADR is confidential

The Manova test statistic for the effect of "contractor type" on the statement ADR is confidential is ($F = 3.77$; $df = 1/159$; $p = 0.054$), which is reported as a trend at the 0.10 level of significance. In order to find where the difference lay a cross tabulation of the frequency of response and the observed means for each group are inspected.

Figure 38: ADR is confidential by "contractor type".

Frequency Row %	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Main contractor	5 4.6%	36 33.3%	57 52.8%	9 8.3%	1 0.9%	108 54.5%
sub- contractor	0 0%	23 25.3%	62 68.1%	6 6.6%	0 0%	91 45.5%
Column Total	5 2.5%	59 29.6%	119 59.8%	15 7.5%	1 0.5%	200 100%

Cross-tabulation of frequency and percentage of response for main contractors and sub/specialist contractors for the statement: ADR is confidential.

An inspection of figure 38 shows that 37.9% of main contractors agree (strongly agree + agree) (4.6% + 33.3%), compared to 25.3% of sub/specialists (strongly agree + agree) (0% + 25.3%) with the statement ADR is confidential. Main contractors are less neutral and more in agreement than sub/specialists with the statement. The observed reported mean for the survey population is 2.74 (95 % CI: 2.64 -2.84)⁷³, which indicates a significant level of agreement. The observed mean for main contractors is 2.67 (95 % CI: 2.54 - 2.82) and for sub/specialist contractor is 2.81 (95 % CI: 2.70 - 2.92) The findings

⁷³ Chapter 4 section 1 para 1.2.3.5

suggest that main contractors are substantially more in agreement with the statement. This difference is in level of agreement rather than opinion. This difference is unlikely to affect the choice of ADR adversely.

When figures 37 and figure 38 are analysed together, it is observed that main contractors are more in agreement with these positive perceptions about ADR than sub/specialists. An inspection of all the observed means and confidence intervals⁷⁴ for the statements in the item pool for main contractors and sub/specialists shows that main contractors are generally more in agreement about the potential advantages of ADR than sub/specialist contractors. One likely reason for this is the level of knowledge that main contractors have, which could be linked to the size of operation and the resources available. This suggests that main contractors are more confident about ADR than sub/specialist contractors. This observation was presented for comment to the interviewees in the follow-up interviews. The general consensus from the interviewees is that sub/specialist contractors lack the resources in management time and finances for extensive education in comparison to main contractors. Large contracting firms not only have greater financial resources but often have in-house legal advisors, who are likely to be more knowledgeable about ADR.

A main contractor commented that sub-contractors are more concerned with getting on with the job and do not have the time or resources to educate themselves on ADR:

"Maybe they (main contractors) have more knowledge about it and read about it. Sub-contractors tend to be smaller organisations. Main contractors have more resources, more people, more time to read and be aware of developments. Sub-contractors are just out there putting the men to work and they just haven't time. "

This view was substantiated by the interviewees who are sub/specialist contractors:

"...well, it is a lack of knowledge from my point of view, as far as ADR itself. It holds

⁷⁴ See appendix 4

me back from saying, 'this is that or that is the problem.'...my knowledge on that subject is so limited."

Many small contractors lack the time and resources to become knowledgeable about ADR but this is not universal and, as a main contractor acknowledged, some sub/specialists hold considerable expertise:

"I am not sure - some sub-contractors are extremely knowledgeable. It depends. The difficulty with this industry is that there are so many sub-contractors who are very small one-man bands or two or three man bands and some of these guys, I suppose, may struggle for a comprehensive range of expertise but that is understandable. But there are an awful lot of sub-contractors who are very knowledgeable and do know what they are doing."

(iii) ADR should be put on a more formal setting.

The MANOVA test statistic for the effect of "contractor type" on the variable ADR should be put on a more formal setting is ($F = 4.27$; $df = 1/159$; $p = 0.04$), which is statistically significant at the 0.05 level. The observed means and a cross tabulation of the percentages and frequency for this statement are examined, in order to locate where the difference lies.

Figure 39: ADR should be put on a more formal setting by "contractor type"

Frequency Row %	Strongly agree	agree	neutral	disagree	strongly disagree	Row total
M a i n contractor	3 2.8%	28 25.7%	51 46.8%	26 23.9%	1 0.9%	109 54.5%
s u b - contractor	6 6.6%	31 34.1%	37 40.7%	15 16.5%	2 2.2%	91 45.5%
Column Total	9 4.5%	59 29.5%	88 44%	41 20.5%	3 1.5%	200 100%

Cross-tabulation of frequency and percentage of response for main contractor and sub/specialist contractor for the statement: ADR should be put on a more formal setting.

Figure 39 shows that 40.7% (strongly agree + agree) (6.6% + 34.1%) of sub/specialists agree in comparison to 28.5% (agree + strongly agree) (25.7% + 2.8%) of main contractors. Sub/specialist contractors are more in agreement with the statement that ADR should be put on a formal setting than main contractors. The observed mean for the total population is 2.85 (95% CI: 2.75 - 3.01) which indicates no significant agreement nor disagreement with the statement.⁷⁵ In comparison, the mean for sub/specialists is 2.73 (95% CI: 2.55- 2.92), which indicates significant agreement. The mean for main contractors is 2.94 (95% CI: 2.79- 3.10), which suggests that there is neither significant agreement or disagreement. Sub/specialist contractors are significantly in agreement that ADR should be put on a more formal basis, whereas main contractors are more neutral on this point. As suggested earlier, this issue concerns using ADR clauses and the non-binding nature of ADR.⁷⁶ These issues are discussed in chapter 5. Respondents and the follow-up interviewees did not show any consensus on the issue of formality.⁷⁷ This finding, however, does indicate that sub/specialist are more likely to want ADR to be put on a more formal basis. This may be due to the general feeling of vulnerability over the manipulation of the formal systems, which was discussed earlier.⁷⁸ One medium sized specialist contractor,⁷⁹ who was interviewed, is against putting non-binding ADR clauses into contracts because, it forces the weaker party to settle in favour of the stronger party:

"There is no place for a non-binding process in a formal contract. Its presence would be abused by the bullies of the industry, to force concessions, using delaying tactics."

2.4.3 Effect of "turnover size" on the positive perceptions about ADR.

When the MANOVA test procedure was run on the item pool of attitudes, the test statistic for the effect of "turnover size" yielded a significant result at the 0.05 level of

⁷⁵ Chapter 4 section 1 para. 1.2.4

⁷⁶ *ibid*

⁷⁷ *ibid*

⁷⁸ Chapter 4 section 1 para. 1.1.5

⁷⁹ The reported turnover for this company is £40,000,000

significance.⁸⁰ When the individual variables about the positive perceptions of ADR, are analysed, there is no significant difference at the 0.05 level, but two statements are significant at the 0.10 significant level, which are reported, as they indicate a trend: ADR is good for multiple claims and ADR indicates compromise.

(i) **ADR is good for multiple claims**

The result of the MANOVA test statistic for the effect of "turnover size" on the statement that ADR is good for multiple claims is ($F = 2.55$; $df = 2 / 159$; $p = 0.081$). This is reported, as it indicates a trend at the 0.10 level of significance. When the Scheffé post hoc test was performed, it indicates that there is a significant difference at the 0.05 level between respondents with a turnover of £6 million and under and those with a turnover of over £6 million but under £50 million.

Figure 40: ADR is good for multiple claims by "turnover size".

Frequency Row %	strongly agree	agree	neutral	disagree	strongly disagree	Row Total
£6 million-	2 2.4%	20 24.1%	57 68.7%	4 4.8%	0 0%	83
£6 mill+ to £50 mill-	0 0%	6 10.9%	41 74.5%	5 9.1%	3 5.5%	55
£50 million+	1 2.8%	18 37.5%	21 43.8%	6 12.5%	2 4.2%	48
Column Total	3 1.6%	44 23.7%	119 64.0%	15 8.1%	5 2.7%	186

Cross tabulation of frequency and percentages for respondents by "turnover size" for the statement: ADR is good for multiple claims.

A cross-tabulation of "turnover size" on the statement that ADR is good for multiple claims shows that 74.5% of the middle size of contractor (under £50 million but over £6 million) are neutral to this statement. (Figure 40) The observed mean for the total survey

⁸⁰ Chapter 4 section 2 para. 2.2.3

population is 2.87 (95% CI: 2.77 - 2.96),⁸¹ which indicates that there is a significant level of agreement for this statement, although it is on the border of the base line of neutral.⁸² The observed mean for the "turnover size" of £6 million and under is 2.75 (95% CI: 2.63 - 2.88). The mean for respondents in the middle size of turnover is 3.09 (95% CI: 2.91 - 3.27) and for respondents with a turnover of £50 million and over, it is 2.79 (95% CI: 2.55 - 3.04). Respondents in the smallest turnover category significantly agree that ADR is good for multiple claims. In contrast, neither of the turnover groups over £6 million either significantly agree or disagree. This analysis of the findings, together with the results of the Scheffé test, are of interest as a trend and indicate that, on this perception about ADR, there is no consensus between the smallest turnover group and the middle one. It is suggested that those respondents with a turnover of over £6 million are less likely to agree that ADR is good for multiple claims and that this may affect their decision to use ADR. Many construction disputes can involve multiple parties. Thus the proponents of ADR would need to address this lack of confidence by the middle size of contractors. The advantage of using ADR for multiparty disputes is examined further in Chapter 7.⁸³

ADR indicates compromise

The MANOVA test statistic for the effect of "turnover size" on the statement **ADR indicates compromise** is ($F = 2.53$; $df = 2/ 159$; $p = 0.083$), which is reported as a trend at the 0.10 level. When the post hoc Scheffé test was performed no two groups are significant at the 0.05 level.

⁸¹ Chapter 4 section 1 para. 1.2.1.2

⁸² Chapter 4 section 1 para. 1.1

⁸³ Chapter 7 para. 3.2.4

Figure 41: Cross-tabulation for the statement ADR indicates compromise by "turnover size"

Frequency Row %	strongly agree	agree	neutral	disagree	strongly disagree	Row total
£6 million-	4 4.8%	29 34.9%	33 39.8%	16 19.3%	1 1.2%	83 44.1%
-£50 million	2 3.5%	25 43.9%	19 33.3%	10 17.5%	1 1.8%	57 30.3%
£50 million+	2 4.2%	27 56.3%	13 27.1%	5 10.5%	1 2.1%	46 25.5%
Column total	8 4.3%	81 43.1%	65 34.6%	31 16.5%	3 1.6%	188 100%

Cross-tabulation of frequency and percentage for respondents by "turnover size" for the statement: ADR indicates compromise.

Although the Scheffé test did not indicate that there is a significant difference at the 0.05 level between the three groups of turnover size on the statement that **ADR indicates compromise**, the cross-tabulation is included (figure 41), as the MANOVA test statistic indicates a trend. There is a notably large difference of agreement between respondents with a turnover of £50 million and over, 60.5% (strongly agree + agree) (4.2% + 56.3%) and both other turnover groups. Only 39.7% (strongly agree + agree) (4.8% + 34.9%) of respondents with a turnover of £6 million and under agree with the statement and 47.4% (strongly agree + agree) (3.5% + 43.9%) of respondents with a turnover of over £6 million but under £50 million agree. The observed mean for the survey population is 2.68,⁸⁴ which is a significant level of agreement for the statement. The observed mean for the smallest "turnover size" is 2.77 (95% CI: 2.58 - 2.96), for the middle "turnover size" it is 2.70 (95% CI: 2.47 - 2.93) and for the largest "turnover size" it is 2.50 (95% CI: 2.50 - 2.74) This indicates that respondents with a turnover of £50 million and over are considerably more in agreement with the statement that ADR indicates compromise than the other two turnover groups. It is not, however, a difference of opinion, but rather a difference in level of agreement. This difference is unlikely to influence the choice of ADR adversely for any group by "turnover size", but, if a party

⁸⁴Chapter 4 section 1 para 1.2.3.4

believes that compromise is a positive attribute, then it is more likely to be a factor which it will take into account in the decision to use ADR.

2.4.4 Summary of the interaction between "contractor type" by "turnover size, the effect of "contractor type" and "turnover size" on the positive perceptions of ADR.

Interaction of "contractor type" by "turnover size"

The MANOVA test indicates that there is an interaction of "contractor type" by "turnover size" at the 0.10 level on the statement **ADR is confidential**. There is a trend, which indicates a difference at the largest "turnover size". Sub/specialist contractors with a turnover of £50 million and over are more likely to disagree, whereas main contractors in the same turnover category agree with the statement. This indicates a lack of confidence by sub/specialists from this group on this variable and it is suggested that the proponents of ADR may need to concentrate on this perception, as it may affect the choice of ADR by this sub-group.

The effect of "contractor type" on the positive perception of ADR.

The effect of "contractor type" on the positive perceptions is not significant but two variables are reported because they indicate a trend up to the 0.10 level. On the variables **ADR saves management time** and **ADR is confidential**, main contractors are noticeably more in agreement than sub/specialists. On the variable **ADR should be put on a more formal setting**, sub/specialist contractors are in agreement with the statement, whereas main contractors are neutral.

The findings suggest that main contractors are more confident about ADR and that this is the reason for the higher level of agreement about the perceived advantages of ADR.

When the means and confidence intervals for all the statements are examined, main contractors appear to be more confident about the potential advantages of ADR. The explanation given in the interviews is that there is a lack of both management and financial resources available for sub/specialist contractors to use on education. Main contractors have more access to information on ADR. A main contractor commented on

the apparent lack of confidence of sub/specialist contractors seem to have in the following terms:

"They don't have the resources. They don't get to the decision making in time. The small minnow just can't continue bearing the cost."

There is a difference between main contractors and sub/specialist contractors on the statement that **ADR should be put on a more formal setting**. Sub/specialist contractors are in agreement with this statement, whereas main contractors are more neutral. One explanation of this is the general feeling of vulnerability felt by sub/specialists in the manipulation of the formal procedure, which was reported earlier. It is likely that this issue is related to that of the non-binding nature of ADR, which will be discussed later.⁸⁵

Effect of "turnover size" on positive perceptions of ADR.

The MANOVA procedure has indicated that there is a significant effect of "turnover size" on the attitude statements in the item pool, but, when the individual test for the positive perceptions about ADR are examined, it reveals that there are no significant differences on these perceptions at the 0.05 level. Only two variables have a significant result at the 0.10 level: **ADR is good for multiple claims** and **ADR indicates compromise**.

The post hoc Scheffé test on the statement **ADR is good for multiple claims** indicates that respondents from the two smallest turnover categories are significantly different at the 0.05 level. Respondents in the smallest "turnover size" are in agreement with the statement, whereas respondents in the middle "turnover size" do not agree or disagree. The results for all the respondents of the survey indicate that they are significantly in agreement with the statement but the MANOVA test suggests that this is not the opinion of all the turnover groups. Respondents from the two largest turnover groups are less confident about the advantage of using ADR for multiple claims and it is likely that this neutrality would affect the choice of ADR by the two largest turnover groups.

⁸⁵ Chapter 5 section 1 para. 1.5

The MANOVA test indicates that there is a difference in the three turnover groups' attitude towards the statement that **ADR indicates compromise** at the 0.10 level, but the Scheffé test did not show a significant difference at the 0.05 level. The findings were inspected, as they may show a trend. There is a noticeably large difference in percentage of agreement between the group with the largest turnover, who agree more, and the other two groups. In the commentary on the attitude of the total survey⁸⁶ to this issue, attention was drawn to two different perceptions that compromise may have: one positive, indicating that the parties are willing to negotiate and one negative indicating that it is a sign of weakness in ones case. Therefore, there is some ambiguity about the statement and this is reflected in the high level of neutrality about the statement and the relatively high level of disagreement. The same argument applies to the difference between turnover size. It is suggested, after an analysis of the comments made by respondents and interviewees, that the first perception was the one generally held by the survey respondents.

The survey results provides evidence that the total survey sample are in agreement about most of the positive perceptions of ADR, although it is noted that the respondents are less emphatic about the more technical attributes of ADR. Statistical tests show that the positive attitudes towards ADR hold true for "contractor type", but that main contractors exhibit more confidence in some statements. It is not believed this will affect the development of ADR adversely. There is a difference on the issue of putting ADR on a more formal footing. Sub/specialists are in agreement, whereas main contractors are neutral. This concern is likely to involve the non-binding nature of ADR, which is explored later.⁸⁷ The statistical tests show that *many of the positive perceptions are held* by all "turnover groups", but that there are some differences at the 0.10 level of significance. There may be a trend for respondents with turnovers of over £6 million to be neutral about the statement **ADR is good for multiple claims**. Many construction disputes can involve multi parties and this neutrality could affect the choice of ADR by larger organisations. Groups from the largest "turnover size " agree more that ADR

⁸⁶ Chapter 4 section 1 para 1.2.3.4

⁸⁷ Chapter 5 section 1 para. 1.5

indicates compromise. It is suggested that most respondents treat this as a positive advantage, but that there is some ambiguity on this statement. Finally, sub/specialists in the largest turnover group show a difference of opinion, at the 0.10 level of significance, from all other groups to the statement that **ADR is confidential**. This is reported as a trend, which may affect the choice of ADR by this group.

Although there are some differences between the groups tested, the survey population exhibit dissatisfaction with many aspects of the formal systems and hold positive perceptions about ADR. The next sections considers the effect of these perceptions on the use of ADR.

3 SECTION THREE: USING ADR

3.1 Will consider using ADR

The postal survey asked the question: **Would you consider using ADR to help to resolve a construction dispute?**

Figure 42: Would you consider using ADR to help to resolve a construction dispute.

	Yes	No	Don't Know	Row Total
Frequency	140	6	54	200
%	70%	3%	27%	100%

Cross tabulation of frequency and percentage of response for the survey respondents to the statement: Would you consider ADR to help to resolve a construction dispute?

The findings indicate a substantial interest in using ADR, with 70% giving a positive response to this question. (Figure 42) It is noticeable that only 3% of the respondents would not consider using ADR: this result suggests strong support for what are relatively new and untried procedures for dispute resolution. The respondents were asked to comment on the reasons why they would, or would not consider using ADR. 69% of the respondents made comments and of these, 43% mentioned the speed of ADR as a reason for using ADR. 35.5% mentioned the cost of ADR. No other positive attributes of ADR were referred to any notable degree. The next most frequently stated reasons for using

ADR were: Using ADR improves the resolution process, 22.1% (27 respondents). Litigation costs too much, 17.4% (21 respondents). Arbitration costs too much, 14.9% (18 respondents) and ADR is less adversarial 10.8% (13 respondents). This data supports the hypothesis that development of the use of ADR by main and sub/specialist contractors is due to dissatisfaction with the formal systems of dispute resolution.

3.2 Results of the number of respondents using ADR.

The findings discussed to date are a strong indication of the respondents' support for ADR and that it is endowed with positive advantages over the formal systems of dispute resolution. Despite this, the survey reveals that, as yet, there has been little experimentation with ADR. The literature search has similarly indicated a growing awareness of ADR but there is little evidence to indicate that ADR has been used by large numbers.⁸⁸

The postal survey was designed with two questionnaires. "Questionnaire One" was for respondents who had never used ADR. "Questionnaire Two" was for respondents who had used ADR to resolve a construction dispute.⁸⁹ When the questionnaires were returned the number of respondents who have used ADR was calculated.

Figure 43: Number of respondents who had used ADR

	<i>Used ADR</i>	<i>Not used ADR</i>	<i>Row Total</i>
Frequency	9	220	229
%	3.9%	96.1%	100%

Cross tabulation of frequency and percentage of respondents who have used ADR.

Table 43 shows that 96.1% of the respondents reported that they have never used any form of ADR. Only 9 (nine) respondents (3.9%) in total returned questionnaire 2, which was for respondents who had used ADR. The fact that only 9 respondents reported that

⁸⁸ Fenn P. and Gould N. (1994) op cit

⁸⁹ Two questionnaires were used in order to make it shorter for the respondent and to attain a better response rate. Chapter 3 para 5.3.2

they had used ADR suggests there are factors restricting its use, which are examined in chapters 5 and 6. One objective of the survey is to analyse the perceptions that contractors have towards ADR. The validity of the study is not compromised by the infrequent use of ADR, as the perceptions of the non-users can be tested statistically, in order to help determine why it is not being used.

The research confirms an earlier survey in the construction industry, undertaken in 1994,⁹⁰ which reported little frequency in the use of ADR in the construction industry. The survey undertaken by Fenn and Gould⁹¹ concluded that there would be an increased use of ADR in the UK in the future, which is supported by the findings of this survey, in that 70% of the respondents state that they would consider using ADR to resolve construction disputes. (See Figure 42) The literature from overseas suggests that other countries are experiencing a growing awareness and use of ADR.⁹²

The results discussed so far have reported and analysed the responses for the entire survey population. The following section examines the statistical tests undertaken to establish if there are any differences between groups representing "contractor type" and "turnover size" on whether they will consider using ADR.

3.3 USING ADR - DIFFERENCES BETWEEN GROUPS

The thesis is concerned with disputes which arise between main contractors and sub/specialist contractors and what influences the choice of ADR to help resolve those

⁹⁰ Fenn P and Gould N. (1994) op cit

⁹¹ ibid

⁹² Reports from the (1994) International Multidisciplinary Conference on Dispute Avoidance and Resolution in the Construction industry suggest that many countries are experiencing an interest and for some counties an increase use of ADR. For example:

Wall C. J. (1994)The Dispute Resolution Advisor Increased use of the Dispute Resolution Advisor in Hong Kong.

Stipanowich T. (1994)What's and Hot What's not: Emerging Results from the First Multidisciplinary Survey on Dispute Avoidance in the Construction Industry. Use of ADR in the US. Reports that mediation is the one preferred ADR technique.

disputes. The above sections have described the negative perceptions about the formal system and the positive perceptions about ADR and the findings suggest that there are no significant differences in attitude between groups, as most of the differences are ones of degree or strength of agreement. Some of the reported differences suggest that, in some attributes, different groups exhibit less confidence, which should be addressed by the proponents of ADR if they wish to develop its use. In any dispute, both or all parties must agree to use ADR if it is to be used, and if one party refuses, the dispute must continue using either the formal systems or negotiation. Therefore, it is of interest to investigate if "contractor type" or "turnover size" differ in their level of agreement to using ADR. A log linear analysis of a multiway frequency table (partial chi-square)⁹³ was used to assess whether there was any difference in response to the question, **Would you consider using ADR to resolve a construction dispute?** by (i) "contractor type", (ii) "turnover size" and (iii) association of "contractor type" by "turnover size".

When cross-tabulations were executed on the question **Would you consider using ADR to resolve a construction dispute?** by "contractor type" (figure 44) and by "turnover size" (see figure 45) both indicated that there are cells with frequencies of less than 5. Figure 44 (by "contractor type") has two cells with a frequency less than 5 and figure 45 (by "turnover size") has 3 cells with a frequency less than 5. One restriction of using chi-square is that the number of items appearing in the "expected" category must be at least five⁹⁴ and as the hierarchical log linear module is based on a partial chi-square, the categories of "no" and "don't know" were collapsed. These categories were collapsed because the main objective of the test was to analyse whether there are differences in the group saying they would consider using ADR.

(1) Analysis of difference of "contractor type" in using ADR.

The result of the hierarchical log linear test of partial association for the effect of "contractor type" on the question: **Would you consider using ADR to resolve a construction dispute?** is (Partial chi-square = 5.42; df = 1; p = 0.0199), which is

⁹³ Chapter 3 para. 7.5.2

⁹⁴ Chapter 3 para. 7.5.2

significant at the 0.05 level and shows that there is a significant relationship between "contractor type" and using ADR.

Figure 44: Would you consider using ADR to resolve a construction dispute? by "contractor type".

Frequency Row %	Yes	No	Don't Know	Total
Main contractor	84 78.5%	3 2.8%	20 18.7%	107
Sub-contractor	56 60.2%	3 3.2%	34 36.6%	93
Column Total	140 70%	6 3%	54 27%	200 100%

Cross tabulation of frequency and percentage for "contractor type" on the question: Would you consider using ADR to resolve a construction dispute.

An inspection of the figure 44 indicates that more main contractors (78.5%) responded positively to the question on whether they would consider using ADR than sub/specialist contractors (60.2%). The hierarchical log linear test shows that this response is statistically significant. Therefore, main contractors are more likely to say they will use ADR than sub/specialist contractors. Further analysis of the cross-tabulation reveals that over a third of sub/specialist contractors (36.6%) do not know whether they would use ADR compared to only 18.7% of main contractors. This supports the conclusion drawn above that main contractors are more confident than sub/specialists about the advantages of ADR.⁹⁵

(ii) Analysis of using ADR by "turnover size".

The result of hierarchical log linear test of partial association for the effect of "turnover size" on the question of using ADR is (Partial chi-square = 6.18; df = 2; p = 0.045), which is significant at the 0.05 level and demonstrates that there is a significant relationship between the "turnover size" and using ADR. There is a statistically significant effect between "turnover size" and saying they will use ADR.

⁹⁵ Chapter 4 para. 2.4.4

Figure 45: Would use consider using ADR to resolve a construction dispute? By category of "turnover size".

Frequency Row %	Yes	No	Don't Know	Total
£6 million and under	52 59.1%	0 0%	36 40.9%	88 100%
Under £50 million	46 78.0%	3 5.1%	10 16.9%	59 100%
£50 million and over	35 81.4%	3 7.0%	5 11.6%	43 100%
Column Total	140 70%	6 3%	54 27%	200 100%

Cross tabulation of frequency and percentage for "turnover size" for the question: Would you consider using ADR to resolve a construction dispute?

When figure 45 is inspected, 59.1% respondents, who are in the smallest category of turnover (£6 million and under), said they would use ADR. This is considerably less than the 78% for respondents with a turnover of under £50 million but over £6 million, or the 81.4% for respondents with a turnover £50 million and over. The hierarchical log linear test indicates that there is a statistically significant difference in turnover category at the 0.05 level of significance. It is statistically more likely that respondents with a turnover of over £6 million will answer "yes" to the question on using ADR. Figure 45 reveals that 40.9% of the smallest "turnover size" do not know whether they would use ADR compared to 16.9% for the middle category of "turnover size" and only 11.6% for the largest "turnover size". "Turnover size" of groups is statistically likely to affect whether ADR is used and an analysis of the cross-tabulation reveals that respondents with a turnover of £6 million or under are less likely to say they would use it than either of the other turnover groups.

(iii) **Analysis of association of "turnover size" by "contractor type" on using ADR.**

The result of the hierarchical log linear test of partial association on "turnover size" and "contractor type" saying they would use ADR is (partial chi square = 2.71; df = 2; p >

0.05). There is no statistically significant association between "turnover size" by "contractor type" in using ADR.

To summarise: main contractors are more likely to say they will consider using ADR than sub/specialist contractors. Organisations with a turnover of over £6 million are more likely to say they will use ADR than organisations with a turnover £6 million and under. Both these factors will be significant in determining whether ADR is used or not. However, there is no interaction between "contractor type" by "turnover size". These results are supported by an analysis of the contractors who have used ADR. (See figure 46) Of these, 9 (nine) respondents 6 (six) are main contractors and 3 (three) are sub/specialists contractors. When the turnover category is inspected, it shows that 8 (eight) are in the largest turnover category, (£50 million and over), 2 are in the middle category (Over £6 million but under £50 million) and only 1 (one) was in the smallest group. (£6 million and under.)

Figure 46: Contractors who have used ADR:

	£6 million and under	Under £50 million	£50 million and over	Row total of contractors
Main contractor	0	1	5	6
Sub/specialist contractor	1	1	1	3
Column total of contractors	1	2	6	9

Cross tabulation of type of contractors who have used ADR by size of turnover.

4 SECTION FOUR

4.1 SUMMARY OF THE RESULTS ON THE FIRST HYPOTHESIS.

One objective of the postal survey was to test the first hypothesis: The development of the use of ADR between main contractors and sub/specialist contractors is due to dissatisfaction with the formal systems of dispute resolution. The objective of the postal survey was to investigate the factors which influence the choice of ADR by contractors and sub/specialists contractors and the hypothesis formulated was that one factor in this

choice was the dissatisfaction with arbitration and litigation. When the survey population's attitudes about the formal systems are analysed, it appears that there is a significant level of agreement about the negative attributes of both arbitration and litigation. Both systems are perceived to be too costly, too slow and there is a significant level of agreement amongst the respondents that there is a need to move away from the adversarial systems for resolving construction disputes. Finally, the survey population significantly disagrees with the statement that litigation is a satisfactory procedure.

However, it is noted that the survey respondents give more support for arbitration, as they do not significantly agree or disagree with the statement: **Arbitration is a satisfactory procedure to resolve dispute.** Despite the evident dissatisfaction with its costs, speed and adversarial approach, there is an indicative level of support for it, in comparison to litigation. This neutral attitude could be positively converted if the main perceived flaws are eradicated or reduced by the 1996 Arbitration Act.

Notwithstanding this observation about arbitration, the findings (reported above) indicate there is a high level of dissatisfaction with the formal systems of dispute resolution and this supports the hypothesis that the development of ADR is due to dissatisfaction with the formal systems. The results reported verify that there is a significant level of dissatisfaction with both arbitration and litigation and it is postulated that this has resulted in contractors holding positive perceptions about ADR, where its attributes could be compared favourably to the formal systems. The results of the total survey population demonstrate that contractors hold positive attitudes towards the statements which compare ADR to the formal systems on issues such as its cost, speed, non-confrontational and non-threatening nature. It is this current level of dissatisfaction with the formal systems which is resulting in an interest in ADR and creating positive perceptions about ADR. In a sense, it is perceived by the respondents that anything has to be better than the formal systems. This contention is supported by statements made by the respondents and the interviewees:

"Well, we have not used it because I suppose no one has proposed it to us. Indeed, to be fair, I don't suppose we have proposed it to anyone else. But if someone had suggested it

to us....I would say, " yes, let's give it a go". On the basis, again, as I say, hopefully, it is going to be better than the present system. I don't know if it is or not, but what is clear is that the present system is not satisfactory."

The findings support the first hypothesis that the development of ADR is due to dissatisfaction with the formal systems of dispute resolution.

Section two has statistically analysed the differences in responses between different groups in the survey. In order to confirm or reject the first hypothesis, it is necessary to investigate whether there are any differences between categories of "contractor type", to assess whether main contractors and sub/specialist contractors hold the same attitudes towards the formal systems and their perceptions of ADR. Section two also analysed the effect of "turnover size", as it has been theorised that the size of contracting organisation could be a factor in the choice of dispute resolution procedure.

The MANOVA test reveals, that between main and sub/specialist contractors, there is a high level of agreement on the negative attitudes towards the formal systems and the comparative positive perceptions about ADR. Any apparent differences are in the level of agreement or disagreement to the statements, rather than differences of opinion. Thus main contractors significantly agree more than sub/specialist contractors that ADR is cheaper than the formal systems and sub/specialist contractors are significantly more in agreement than main contractors that there is a need for the quick resolution of construction disputes.

It is not believed that either of these differences in strength of agreement will be a factor which is likely to affect the choice of ADR negatively by either contracting group. The perception that ADR is cheaper than the formal systems is likely to be an influential factor for main contractors in their choice of dispute resolution procedure. Sub/specialist contractors may be influenced by an ADR procedure that provides a quick resolution to their dispute. This issue of delay is discussed in more detail in the following chapter.⁹⁶

⁹⁶ Chapter 5 section 1 para. 1.4 and section 2 para. 2.1-2.3

Further, the results of the MANOVA test do not reveal that there is any difference in attitude to the statement that arbitration is a satisfactory procedure to resolve disputes by either main contractor or sub/specialist contractor group. Therefore, it is unlikely that either group is inclined more favourably towards arbitration and, therefore, likely to choose this procedure before ADR.

There is a significant difference in response, at the 0.05 level, between respondents with a turnover of £50 million and over and the other two turnover groups to the statement that **ADR is less threatening than arbitration**. An analysis of the response to the statement indicates that all three groups significantly agree with the statement, but that respondents in the largest turnover category agree significantly more. It is possible that respondents in the largest turnover group may have had more negative experiences of arbitration, which is reflected in the group being more in agreement than the other two groups about its threatening nature.

There is a significant difference in response, at the 0.05 level, between respondents with a turnover of £6 million and under and those with a turnover of £50 million and over on the statement that **Litigation is a satisfactory procedure**. An analysis of the result reveals that respondents in the smallest "turnover size" significantly disagree more than those in the largest "turnover size" with this statement. It is suggested that the smallest size of contractor finds litigation more unsatisfactory than the other two larger turnover groups, due to a lack of resources to fund litigation in its costs and time.

An analysis of the results of the inferential statistics indicates that, although there is an effect of "turnover size" on these two variables (**ADR is a less threatening than arbitration** and **Litigation is satisfactory**), any differences are ones of degree, rather than indicating a difference of opinion on the above statements. The fact that respondents with a turnover of £50 million and over are significantly more in agreement with the statement that **ADR is less threatening than arbitration** will not affect negatively their choice of ADR as a dispute resolution procedure. It is more likely to be a factor in its selection over arbitration. Further, the fact that respondents with a turnover of £6 million and under disagree significantly more than those with a turnover of £50 million

and over that **litigation is a satisfactory procedure** will not negatively affect their choice of ADR as a dispute resolution procedure. Again, it is more likely to be a factor influencing this group in the choice of ADR over litigation.

An analysis was also undertaken of the effect of "turnover size" on the variables:

Litigation costs too much and **Arbitration costs too much**, as the MANOVA test statistics indicates differences up to the 0.10 level and therefore the variables were investigated as a trend. All groups agree with both statements about the costs of the formal systems. Although the Scheffé test did not find that any two groups are significantly different at the 0.05 level, an observation of the cross-tabulations for these two variables disclosed that the middle category of "turnover size" (under £50 million but over £6 million) demonstrate a high level of concern about the costs of both the formal systems. It is not believed that this factor will affect the choice of ADR by organisations from the middle category of turnover adversely, but it is more likely to be a factor taken into account by these organisations, when deciding whether to use either arbitration or litigation.

To summarise: the three categories of "turnover size" do not significantly differ in their attitudes to arbitration or litigation or the comparative advantages of ADR. The three categories are in agreement over dissatisfaction with formal systems and in the comparative advantages of ADR. Any differences between turnover groups are in level of agreement rather than indicating differences of opinion. The descriptive statistics of the survey populations reveal extensive dissatisfaction with the formal systems and positive perception about ADR. The inferential statistical tests indicate that there is no difference of attitude held by either "contractor type" or "turnover size" and that any differences exposed are ones of degree of agreement rather different attitudes. Thus the findings support the first hypothesis that the development of the use of ADR is due to dissatisfaction with the formal systems.

Section 2 discloses that many of the positive advantages of ADR which are claimed by its proponents are perceived to be so by the contracting sector, but that there is substantial unawareness of the more technical aspects such as its flexibility, its suitability for multiple

claims and its high settlement rate. Statistical tests considered if there is any significant difference in "contractor type" and "turnover size". The MANOVA test statistic indicates that there is no effect of "contractor type" on the positive perceptions about ADR, but two variables were reported, as they indicate a trend: **ADR saves management time** and **ADR is confidential**. It is observed that main contractors are more in agreement than sub/specialist contractors with both statements. An inspection of the observed means and the confidence intervals of all the attitude statements⁹⁷ reveals that main contractors are more confident, generally, about the potential advantages of ADR. The data from the follow-up interviews support this observation and the interviewees are of the opinion that this was due to differences in management and financial resources which can be employed for education.

However, there is a significant difference between main contractor and sub/specialist contractors regarding the statement that **ADR should be put on a more formal setting**. Sub/specialists show a significant level of agreement with the statement, whereas main contractors are neutral. It is contended that this issue is related to the perception that the weakness of ADR is that it is a non-binding procedure. Further, it is suggested that this may be a significant factor in the choice of ADR as a dispute resolution process, as it may influence the use of ADR, particularly from the sub/specialists' view point. This is explored further in chapter 5.

The MANOVA procedure indicates that there is a significant effect of the "turnover size" on the positive perceptions about ADR. Two variables were examined because they are significant at the 0.10 level. The result of the Scheffé test reveals that there is no consensus between the three turnover groups about the statement **ADR is good for multiple claims**. Although the survey population significantly agree with this statement, when the cross-tabulation is analysed it is interesting that respondents with a turnover of under £50 million and over £6 million are neutral. Many construction disputes can involve multi-parties and the proponents of ADR will need to address this lack of confidence on the part of middle size contractors in this possible advantage of ADR.

⁹⁷ See appendix 4

The effect of "turnover size" on the statement **ADR indicates compromise** was also reported because of a significant difference at the 0.10 level. Observation of the cross-tabulation indicates that the smallest and the largest turnover group differ in the level of agreement. Respondents with a turnover of £50 million and over are more in agreement with the statement than contractors with a turnover of £6 million and under. It is suggested that there is ambiguity about the meaning of this statement but, for respondents who view compromise as a negative factor, this may affect their choice of ADR.

The inference drawn from the effect of "turnover size" on the positive perceptions about ADR is that there is little differences in attitude between the three categories of turnover size. The total population hold many positive perceptions about ADR and this is true for "turnover sizes". However, respondents in the two largest turnover groups differ from the smallest turnover group on the statement that **ADR is good for multiple claims**. It is suggested that this could affect the choice of respondents from the larger turnover groups, if they are involved in multi-party disputes.

The results suggest that the survey population are positively interested in ADR; 70% of the respondents indicate that they would consider using ADR to resolve construction disputes. Despite this, the findings show that there is little experimentation with it so far. A statistical analysis of the attitudes held by the survey respondents towards the formal systems and the positive perceptions of ADR reveals that there is little difference between "contractor type" and "turnover size". However, the statistical tests on the question whether the respondents would use ADR reveals that some groups are statistically more likely, at the 0.05 level of significance, to say they will use it than others. Main contractors are more likely than sub/specialists to say they will consider using ADR, which supports the contention that they are more confident about ADR. Further, respondents with a turnover of £6 million and over are statistically more likely to say they will consider using ADR than the smallest turnover category. Therefore, it is concluded that "turnover size" and "contractor type" are a relevant factor in the developing use of ADR.

4.2 ANALYSIS OF FIRST HYPOTHESIS

The results of the postal survey concerning the perceptions of arbitration and litigation reveal a picture of substantial dissatisfaction towards the formal systems which are held by the survey respondents. In contrast, the attitudinal questions about ADR, which draw a comparison with the formal system, suggest that on the major issues of costs, time and its non-confrontational nature, the respondents hold positive perceptions that ADR has the desired qualities missing in both arbitration and litigation. The findings suggest that many of the positive advantages of ADR, which its proponents have claimed, now exist as perceptions in the sector of contracting in the construction industry. However, the survey also exposes substantial lack of awareness about the more technical aspects of ADR. This is depicted in the high level of neutrality on such issues as the flexibility of ADR, its suitability for multiple claims and its high settlement rate. It is suggested that the substantial number of respondents who affirmed that they would consider using ADR (70%) and the confirmation about the perceived advantages of ADR is generated because of a significant dissatisfaction with the formal systems.

In those areas where the formal systems are seen to be failing the industry: its costs, delay and adversarial approach, the perception in the contracting sector of construction is that ADR must be a better option. *In contrast, ADR is invested with the advantages of speed, cheapness, being non-confrontational and non-threatening and with the added boon of avoiding lawyers' fees.* It is this current level of dissatisfaction with the formal systems which is creating an interest in ADR. In a sense it is perceived, by the respondents, that anything has to be better than the formal systems. Statements made on the survey questionnaires and interviews by both main contractors and sub/specialist contractors alike attest to this perception:

"Any system is better than the existing systems of litigation and arbitration. These systems have been taken over by lawyers!!! They control the process and costs. The participants pay with time, money and time!!" (Exclamation marks given by respondent.)

The findings of the research discussed so far provide data to support the first hypothesis. The interest in ADR is driven (primarily) by the feelings of dissatisfaction caused by the

problems with litigation and arbitration. The general attitude, which was frequently expressed in the survey and the interviews is that any alternative is preferable. The results of the survey indicate that ADR is viewed extremely favourably in comparison to the worst features of the formal systems, yet the survey findings are that there is no great frequency of use. The second and third hypotheses formulated are that negative perceptions are held in the construction industry by main contractors and sub/specialist contractors and that these will influence the development of ADR. One objective of the postal survey was to assess whether these negative perceptions are more generally held by main and sub/specialist contractors and how they affect the choice of dispute resolution procedure. The next chapter reports the findings of the negative attitudes towards ADR and assesses the influence these have in the choice of ADR as a dispute resolution procedure.

CHAPTER 5

NEGATIVE PERCEPTIONS OF ADR

The aim of this thesis is to assess the factors which impact on the development and choice of ADR as a dispute resolution procedure by contractors in the construction industry. This contribution could be distorted through misconceptions produced by the positive image building of its proponents and the negative attitudes fostered by its opponents. The previous chapter discussed the positive perceptions of ADR which are held by contractors and theorized that they are attributable to the perceived major defects in the formal systems. Despite extremely strongly held perceptions about the positive attributes regarding the speed, costs and non-adversarial nature of ADR, it is not frequently in use as a dispute resolution procedure. Research in the United States¹ (US) revealed that negative attitudes about ADR were prevalent in the construction industry and a survey of US construction lawyers was undertaken to test these attitudes. The study supplanted the anecdotal attitudes with actual data and concluded that little credence was given to the negative perceptions. One hypothesis of this research is that contractors hold negative attitudes about ADR and a second hypothesis is that these negative perceptions are affecting the development and choice of ADR in England and Wales. One objective of the postal survey was to assess whether the negative perceptions, which have been elicited from the United Kingdom construction literature and the indicator interviews, are held by main and sub/specialist contractors more generally and whether they are affecting the use of ADR.

This chapter examines the second and third hypotheses of the research.

- 2. Main contractors and sub/specialists contractors hold negative perceptions about ADR.**
- 3. Negative perceptions of ADR influence the choice of ADR as a dispute resolution process by main contractors and sub/specialist contractors.**

¹ Stipanowich T. and Henderson D. (1992) op cit

Section 1 gives a descriptive analysis of results for the total survey population, which was designed to assess the existence and extent of the negative perceptions. The cumulative results of main contractors and sub/specialist contractors are given together. Section 2 analyses any differences between groups of "contractor type" and "turnover size". Section 3 considers the attitudes of the respondents to inserting ADR clauses into construction contracts and finally, section 4 draws together the results of these analyses and tests the second and third hypotheses.

Major factors influencing the use of ADR.

As reported in the previous chapter, despite a strong affirmative response that the respondents would consider using ADR (70%), there has been as yet little use of it by contractors in the construction industry. Only 3.9% of the respondents reported using any ADR procedure.² Some of this apprehension is explained by the comments made by questionnaire respondents and follow-up interviewees to rationalise their decision for considering the use of ADR. There is a natural reluctance to be the 'guinea pig' in testing out the new procedures. A specialist contractor who was interviewed explained this resistance to experiment with ADR. There is a need to know the experience of others before using it:

"One thing we would need to know, because it is relatively unused, we cannot decide until people have actually used it. So there is some sort of comparison between the two. From our point, we would need to talk to someone who had got experience of that (ADR) and arbitration and their perception of how it worked out. We would not want to go out into any sort of dispute knackered, blind. Oh, this sounds a jolly good idea, we will give it try and three months down the road it is an absolute disaster. So it is not relatively new but it is relatively unused. It is something where it would possibly hold us back."

The hypothesis had been formulated that other negative perceptions are held by contractors and that these are influencing the choice of ADR to resolve construction disputes. One of the objectives of the literature review and the indicator exercise was to compile a list of

² Chapter 4 section 2 paras. 3.1-3.2

the most frequently expressed negative perceptions, in order to translate them into attitudinal statements, which could then be tested in the questionnaire survey. These negative perceptions centre around the following issues:

Using ADR is a sign of weakness.

ADR reveals too much of one's case to the other side.

ADR can be used to create delay in settlement.

The weakness of ADR is that it is a non-binding procedure.

One feature of the literature search which was identified, is that the negative perceptions are not only propounded by the opponents of ADR. Some of the negative perceptions are raised by the proponents of ADR, who then counter their objections by suggesting strategies to overcome these attitudes.³ Thus, they suggest, the fact that ADR is perceived as indicating a weakness in one's case can be overcome by inserting ADR clauses into contracts.

1 SECTION ONE

NEGATIVE PERCEPTIONS OF ADR

One objective of the postal survey was to see if the above stated negative perceptions are held by contractors more generally. The survey asked attitude statements which were designed to test these perceptions. This section assesses the impact of the findings about these negative perceptions on the choice of ADR by contractors as a dispute resolution process.

1.1 Respondents who have rejected a proposal of ADR.

ADR is regarded by many in construction as new and in its infancy. Therefore, one objective of the survey was to discover whether ADR is being proposed by either party in a construction dispute and what factors are relevant in causing it to be rejected. It was believed that the data from these responses could be valuable in assessing the factors which influence the choice of ADR as a dispute resolution procedure. The literature

³ Brooker P. and Lavers A. (1994) op cit

search had revealed evidence suggesting that ADR is not in frequent use in the construction industry;⁴ there is no available data on the factors involved in the choice of dispute resolution procedure or the reasons for rejecting it as a process. The aim of the survey was to provide such data.

The survey asked the question: **Has ADR ever been proposed as a process to resolve any construction dispute in which your organisation has been involved?** Yes ()
No ()

Figure 47: Has ADR ever been proposed to resolve a dispute?

	Yes	No	Missing	Total
Frequency	26	168	35	229
Percentage	11.4%	73.4%	15.2%	100%

Table of frequency and percentage of response for the survey population to the question: Has ADR ever been proposed as a process to resolve any construction dispute in which your organisation has been involved?

The results from figure 47 indicate that ADR is beginning to be proposed as a process for dispute resolution, though not in great numbers. The numbers involved, 11.4%, (in total 26), is too small to make any statistically significant analysis of their responses to the statements regarding the factors involved in the rejection of a proposal to use ADR. Nevertheless, the results may be seen as valuable in pointing to factors involved in the rejection of ADR at the present time.

These respondents were asked to assess their level of agreement with a series of statements about their decision not to use ADR. Included in these statements were the negative attitudes which have been described above, together with other possible reasons for not using ADR, for example: the influence of the legal advisor's recommendation, the possibility that the dispute was regarded as too large, or too small for ADR and the belief that the formal systems were the more appropriate forum for their particular dispute.

⁴ Fenn P. and Gould N. (1994) op cit

The observed mean, standard error (SE) mean and a 95 % confidence interval for these statements is given. They are used to illustrate and highlight the grounds that have been identified as precluding the use of ADR. It is contended that these factors are pivotal in the decision not to use ADR and will be influential in the potential use of ADR in the future.

1.2 USING ADR IS A SIGN OF WEAKNESS.

There is a strongly held perception that the formal systems are used in tactical manoeuvres to cause delay or initiate settlement.⁵ Sub/specialist contractors threaten or issue writs and notices to arbitrate in the legal and arbitral process in order to indicate the seriousness of their intention regarding the dispute. Further, main contractors are aware of the relevance of these signals. If ADR is perceived as a sign of weakness, it is unlikely that it will be proposed or used as an initial strategy in the resolution of construction disputes. The respondents were asked to assess their level of agreement to the statement: **Using ADR is a sign of weakness.**

Figure 48: Using ADR is a sign of weakness.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	3	12	73	98	13	199
%	1.5%	6%	36.7%	49.9%	6.5%	100%

Cross tabulation of frequency and percentage of the survey response to the statement: Using ADR is a sign of weakness.

Figure 48 shows that only 7.5% agree (strongly agree + agree) (1.5% + 6%) with the statement that using ADR is a sign of weakness and over half of the respondents disagree. 56.4% (disagree + strongly disagree) (49.9% + 6.5%). The observed mean is 3.53 (SE mean 0.05) (95 % CI: 3.43 - 3.64), which is a significant level of disagreement with the statement. Thus this negative perception about ADR is not held by the total respondents to the survey generally.

⁵ Chapter 2 para. 4.2.1 and chapter 4 para. 1.1.5

One respondent to the survey suggested that this perception is held by the construction industry, but attributed the infrequency of using ADR to lawyers, who are not recommending the procedures:

"The market place appears to consider ADR to be a sign of weakness of case. Many lawyers appear not to be recommending it, yet have set up ADR specialist departments."

Despite this observation, the response to this statement indicates that those surveyed did not agree with this negative perception and, when the respondents were asked to comment on their reasons for stating why they would not considering using ADR, very few cited this concern as a factor for their reluctance to use it. The follow-up interviewees displayed little concern with this perception, thus corroborating this result.⁶

Further evidence of the lack of importance given to this negative perception is provided by those respondents to the survey who have decided not to use ADR after it has been proposed. They were asked how much they agreed or disagreed with the statement: **Using ADR would have suggested that our case was weak.**

The observed mean for this statement is 3.45 (SE mean 0.24), (CI: 2.88 - 3.98), which does not indicate any significant level of agreement or disagreement. This finding, together with the survey's response to the statement that using ADR is a sign of weakness, indicates that it is unlikely that this negative perception is an instrumental factor in the decision by contractors not to use ADR. This has interesting repercussions for the proponents of ADR who intimate that the attitude exists and claim that the way to avoid its effect is to put ADR clauses into construction contracts. The inevitable question raised by their analysis is: Who will benefit from the inclusion of ADR clauses?⁷

⁶ This perception was discussed in the legal advisor interviews and there is evidence that legal advisors who have been actively involved in ADR sometimes recommend it to discover the strengths of the other sides argument. See chapter 7 para. 3.1.3

⁷ Chapter 5 section 3 paras. 3-3.1

1.3 ADR REVEALS TOO MUCH OF THE CASE TO THE OPPOSITION.

In the indicator interview, one prominent legal advisor explained that a major disadvantage in using ADR is that it leads to settlement before the full facts of the dispute are known:

"It is only after discovery that what has probably happened can come out. In complicated construction disputes, few people know what is going on. Reports are condensed. People in big disputes generally believe they are right. We know from experience that it is quite late on before we find out what the story is. If they (lawyers) advise ADR on information that is incomplete, they (clients) may settle on the wrong basis."

This argument is taken further in that one negative perception intimated about ADR is that, by using the procedures, the opposition can discover the strengths and weaknesses of a case, which is prejudicial to future trial or arbitration strategy.⁸ This negative perception was tested in the survey by asking the respondents to assess their strength of agreement to the statement: **ADR reveals too much of the case to the opposition.**

Figure 49: ADR reveals too much of the case to the opposition

	Strongly agree	agree	Neutral	disagree	strongly disagree	Total
Frequency	3	26	136	33	1	199
%	1.5%	13.1%	68.3%	16.6%	0.5%	100%

Cross tabulation of frequency and percentage of response for the total survey to the statement: ADR reveals too much of the case to the opposition.

Figure 49 shows that 68.3% of respondents are neutral and only 14.6% agree (strongly agree + agree) (1.5% + 13.1%) with the statement that ADR reveals too much to the opposition. The observed mean is 3.02 (SE 0.04) (95% CI: 2.92 - 3.09), which denotes that there is no significant level of agreement or disagreement.

⁸ This attitude was identified in the US literature, but a major survey of legal advisors to the construction industry concluded that it was not the experience of those surveyed. Stipanowich T. and Henderson D. (1992), op cit

In the follow-up interviews, one respondent who had rejected using ADR, did concede that the perception that ADR reveals too much of the case to the opposition was one factor taken into account, but this decision was linked to the perceptions that ADR is non-binding and can be used to create delay:

"It has been proposed to us very seriously once and the other side even considered it once but in the end we decided not to go that route because the other side was a main contractor and we didn't feel that it would be to our advantage to use it."

(Interviewer: Can you explain why?)

"Yes, since we were looking for money and they weren't they could afford to sit back and see what we had to say without any commitment on their part. So they could use up a few months, six months or however long it takes and decide the strengths or weaknesses of our case and decide whether they should ultimately settle or fight a proper action. We just didn't think it was for us. If they had agreed to be bound by the mediation process, we would have gone ahead but of course that defeats the object, doesn't it?" (emphasis supplied)

In contrast to the view that ADR reveals too much of one's case to the opposition, it was suggested by survey respondents and in the follow-up interviews that ADR could, in fact, be beneficial in the process of settlement. By revealing the strengths and weaknesses of a dispute, ADR could lead to a more realistic assessment of one's position and could consequently aid an eventual settlement. An interviewee representing a major main contractor explained that using ADR, rather than being a weakness, could aid the settlement of dispute, even if the actual decision or process failed to reach any conclusive end, because it would enable the parties to assess their arguments:

"I think my sort of reaction to this is that if you do go through the ADR process and even if the other side don't accept you know it does have an impact on your opponent. He says to himself, 'Well, you know these people involved in this ADR process are a reasonable standing. I have to admit that most of the points were put to them, though the decision

has gone against me. I ought to be trying to think of trying to settle this on the basis that I am then going to try to look for as many weaknesses as possible.....I think we ought to try and settle for such and such.' So I think it does probably have an impact leading to a settlement even if the ADR process is not accepted."

The lack of impact of this perception is exemplified by the respondents who had rejected or decided not to use ADR for a dispute that they had experienced. These respondents were asked to assess how much they agreed or disagreed with the statement: **ADR would have exposed the organisation's position to the opposition.** The observed mean to this statement is 3.09 (SE mean 0.24) (CI: 2.51 - 3.59), which does not indicate that there is any significant agreement or disagreement with this statement concerning the reasons for rejecting ADR.

This result, together with the findings for the total survey population, suggests that the respondents do not perceive generally that ADR reveals too much of one's case to the opposition and, therefore, it is likely that this not a factor which is of overall importance in the decision not to use ADR. This was the conclusion of the research into negative perceptions in the US construction industry.⁹ The US survey was addressed to construction lawyers. In order to appraise the attitudes of legal advisors to the UK construction industry to the negative perceptions of ADR, a separate study was undertaken.¹⁰ If the legal advisors have negative perceptions about ADR, it is unlikely that they will recommend it to their clients. If the legal advisors perceive that a major disadvantage of ADR is that it reveals too much of the case to the opposition, it is unlikely that they will recommend it, preferring to rely on the formal systems. The survey data suggests that contractors do not hold this negative perception; therefore, the influence of legal advisors in the choice of dispute resolution procedure could become paramount. This issue is examined in chapter 7.

⁹ Stipanowich T. and Henderson D. (1992), op cit.

¹⁰ Chapter 3 paras. 9-9.5 and chapter 7 paras. 3-3.1.3

1.4 USING ADR TO CREATE DELAY.

The indicator interviews had disclosed apprehension that ADR could be used in two ways to create delay: either by forcing the use of ADR by mandatory court or contract provision, which would merely force the parties go through another hoop before reaching arbitration or litigation, or by the manipulation of the ADR procedures to create another barrier to prevent settlement and, thus, delay payment. Two objectives of the postal survey were: first to test whether contractors hold a negative perception about ADR being used to create delay in settlement and second, to assess whether the fear of delay is one of the underlying reasons behind the decisions not to use ADR.

The survey asked the respondents to gauge their level of agreement to the statement: ADR can be used to create a delay.

Figure 50: ADR can be used to create a delay.

	Strongly agree	agree	Neutral	disagree	strongly disagree	Total
Frequency	8	51	96	41	3	199
%	4%	25.6%	48.2%	20.6%	1.5%	100%

Cross tabulation of frequency and percentage of response for the total survey to the statement: ADR can be used to create delay.

Figure 50 reveals that only 29.6% of the respondents agree (strongly agree + agree) (4% + 25.6%) and nearly half the respondents (48.2%) are neutral to the statement ADR can be used to create delay. The observed mean is 2.90 (SE 0.06) (95% CI: 2.75 - 2.99), which indicates that there is significant agreement with the statement. However, it is noted that the null hypothesis is that the population mean is 3 and the CI is very close to this. Thus, there is a weak level of significance. The results suggests that the respondents agree that ADR can be used for delay, but there is a high percentage who are undecided on the issue. (48.2%)

Comments by respondents to the survey and by interviewees in the follow-up interviews produced evidence to support the fear that ADR could be used to create delay

"I think most people would be willing to use it in principle. The problem is if you are on the attacking side and the other side suggest it, you think, why? I think the biggest thing against ADR at the present time is a delaying tactic really".

This perception is particularly prevalent amongst the sub/specialist contractors,¹¹ but it is not confined to this group. Main contractors admitted that ADR lends itself to the tactic of delay in the resolution of disputes by, *"play(ing) into the hands of the stallers."* One interviewee representing a major main contracting group substantiated the view that the parties to a dispute can manipulate ADR in order to waste time:

"I think that at the moment people are sort of paying lip service. I don't think it is the lawyers, it's the parties themselves, they think, 'Oh, we can go through this, we can waste time, all we've got to do is just say no all the time.'"

Other more sinister reasons for not using ADR were suggested by sub/specialists: fears of being *"blacklisted"* or *"brow beaten"* into submission due to unreasonable delay were cited as reasons for not using ADR. The indicator interviews had raised the potential use of ADR to create delay in settlement by suggesting it will just be another hurdle in the dispute resolution procedure, which a party could utilise in order to prevent an eventual settlement. Further, it was intimated that the legal profession will be instrumental in this. This view was documented in an indicator interview with a leading construction solicitor:

"We will use it to delay if we want delay. In a large number of disputes, it is in the interests of one party not to settle quickly. If it is compulsory to put in mediation (clauses), then it will be used as a tactic. If I see the other side mucking about, see their tactics, then I won't use ADR."

In fact, the legal advisor in question had never used ADR at the time of the interview, although s/he stated that most sophisticated clients asked about ADR. Legal advisors' attitudes to the use of ADR to create delay are discussed in chapter 7.

¹¹ See chapter 5 para. 2.2 for the analysis of the effect of "contractor type".

The results from the respondents who had refused a proposal of ADR or had a proposal refused by the other party is mixed on this issue of delay. They were asked to assess how much they agreed or disagreed with the statement: **Using ADR would have meant a delay in settlement.** The observed mean is 3.50 (SE mean 0.26) (95 % CI: 3.13 - 4.24), which suggests there is significant disagreement with the statement that using ADR would have meant a delay in settlement. It appears not to have been an issue for these respondents.

Further, these respondents were asked to assess their level of agreement with the statement: **Using ADR was a tactic for delay.** The observed mean for this statement is 3.36 (SE mean 0.20) (95 % CI: 2.96 - 3.88), which does not indicate any significant disagreement or agreement with the statement. Again, this issue does not appear to be a highly important factor influencing their decision not to use ADR.

However, comments made by respondents to the survey and the follow-up interviews evidenced a level of awareness that the potential for delay by using ADR exists. 48.2% of the survey population (see figure 50) are neutral to the statement that **ADR can be used to create delay**, which suggests some indecision in this area. This may be one issue where the opponents of ADR will capitalise. Delay of payment has been a major concern in the construction industry and was considered extensively in the Latham Report.¹² Sub and specialist contractors feel particularly vulnerable to what they perceive as the tactic of delay used by main contractors to prevent payment. If sub-contractors are persuaded by the opponents of ADR that it is merely a delaying strategy, this will have a major impact on the choice of ADR for dispute resolution.

1.5 THE NON-BINDING NATURE OF ADR AS A WEAKNESS.

The survey asked the respondents to measure their level of agreement with the statement: **ADR is non-binding, this is a weakness of the procedures.**

¹² Latham M. (1994) op cit

Figure 51: ADR is non-binding, this is a weakness of the procedures.

	Strongly agree	agree	Neutral	disagree	strongly disagree	Total
Frequency	32	75	73	17	1	198
%	16.2%	37.9%	36.9%	8.6%	0.5%	100%

Cross tabulation of frequency and percentage of response for the total survey to the statement: ADR is non-binding. This is a weakness.

From figure 51 it is seen that over half of the respondents agree (55.1%) (strongly agree + agree) (16.2% + 37.9%) with the statement that **ADR is non-binding, this is a weakness** and only 9.1% disagree (disagree + strongly disagree) (8.6% + 0.5%). The observed mean is 2.39 (SE 0.06) (CI: 2.28 - 2.54), which demonstrates a significant level of agreement with the statement. Of the four negative perceptions tested, this reservation about ADR manifests the highest level of concern. This result is extensively substantiated by comments made by respondents to the survey and in the follow-up interviews.

One concern regarding the non-binding perception of ADR is that the issue of delay is intrinsically linked with this perception. A party can agree to ADR and go through the process in order to gain time, knowing that at the end of the procedure they can refuse to reach a settlement or to agree to the third party neutral's decision, thus, forcing the other party to continue with the formal procedures. During this process of delay, the main contractor is gaining the advantage of the project continuing. This perception of the ability to manipulate ADR, because it is non-binding, at the expense of the sub-contractor, was explained by one specialist contractor:

"Yes, I can see that (ADR is a delaying tactic) because you have got this non-binding element, so you could go along with it for the time being, paying lip service to it. It doesn't cost us anything and it will buy us a few weeks, especially if it is an interim dispute that is ongoing throughout a project, because what the main contractor does want to do is buy time enough to finish the job. He is not too bothered about what happens at

the end of it, as long as he can keep it working and he can certainly do that by paying lip service to ADR. The other party is thinking, 'Well we are going to get this result. We are going to have these meetings and we will come to an agreement. So we will carry on working, adding up the costs of labour, materials and all the other resources.' You finish the job and then you can say, ' We have had the ADR. We don't agree with the decision, so we will see you in court.' " (emphasis supplied)

The above interviewee's legal advisor (a claims consultant) had explained the disadvantages of using ADR in a particular dispute in which the company was involved and indicated that a major problem with ADR is that it is non-binding. The best that could be gained from ADR is a compromise and with both parties *"equally aggrieved"*:

"He briefly explained to us what it was and on the face of it, it sounded okay but they said the pitfalls were: number 1, it doesn't appear in any standard form of contract or sub-contract as it is alternative. So they said, contractually, it doesn't exist. The other pitfall is it is not legally binding, so there's no point in using it if both parties are 100% determined to thrash out their differences. You come away with a compromise, that's the best you are going to get. You are not going to get your own way. You just get a compromise that, hopefully, you can both live with. So the sort of concept was, if you do not get the best deal out of it, if you can both feel equally aggrieved, then it is probably the best result."

The problem of the non-binding nature of ADR is a primary area of concern for contractors and it is likely to be one of the major factors involved in the decision not to use ADR. The respondents to the survey and many interviewees confirm that this is a serious drawback to ADR. ADR, in many contractors' eyes is an ineffectual, time wasting process, unless it is given teeth and made binding. As one sub/specialist contractor declared in the follow-up interviews:

"If it's going to be non-binding, then what is the point of it? You could come out on top and if it all amounts to nothing, what point is there? Well, the last thing you want is, 'Well we won but they are not going to pay and they don't have to pay.' Why go down

that route when you get nothing from it at the end of the day?"

For many contractors, the message appears to be: to use ADR it must be a binding process. Without this attribute, contractors perceive it to be a major weakness of the procedures:

"..Agree. (got to be binding) Got to be prepared to go in and lock the door."

"I think this is one of the problems with ADR. I think it's got to be given some teeth...."

As suggested in the previous chapter, the respondents to the survey hold positive perceptions of the advantages of ADR over the formal systems in the areas of costs, time and avoiding the adversarial approach, but the attitude which is prevalent is that ADR must be binding, which was explained by an interviewee:

"I think it is a genuine feeling that if you are going into something and go through all the sort of pain and tears of the thing, it needs a bit more teeth."

The existence of this negative perception gains further support from the respondents who have rejected a proposal to use ADR. They were asked how much they agree or disagree with the statement: **Did not want to use a non-binding procedure.** The observed mean for this statement is 2.26 (SE 0.23) (95% CI: 1.83 - 2.91), which is a significant level of agreement. For respondents, who have refused to use ADR, this negative attitude is the only one which they significantly agree with.¹³

This perception from respondents who have refused to use ADR, together with the negative perception which is held by the total population that **the weakness of ADR is that it is non-binding**, indicates that it is this area which is significantly influential in the choice of using ADR. The proponents of ADR need to address this perception if ADR is to develop as a process for resolving disputes between main and sub/specialist contractors.

¹³ See appendix 4

This view, however, is not held by respondents who have either used ADR or who perceive themselves as being more informed. They expressed surprise at this level of concern. For them, it is not an issue, because once consensus or a decision has been reached between the parties, a binding agreement can be drawn up, which overcomes this potential problem. An interviewee explained the advantages of ADR and how the final agreement could be made binding:

"If you can present a case on the bare bones quickly and cost effectively and arrive at a definite solution on these facts, that's the answer. It makes you reconsider your position, if at the end of the day, having looked at the facts from both sides and listened to the mediator saying, 'Well, your weakness is this.' Then you draw up your agreement, sign, seal and deliver it there and then."

Those respondents who have used ADR regard the fear of the non-binding perception as unfounded and, in some instances, unsophisticated. As one main contractor stated:

"I can't answer that. (weakness of ADR is non-binding) I think it is perhaps an unsophisticated view. You can only change perceptions with education."

Even a failed ADR is seen to be advantageous by some respondents. An interviewee who had experienced a mediation explained the advantages of ADR. Although the mediation had not reach a resolution, the interviewee did not consider either the fact it was unsuccessful nor the fact it was not binding a disadvantage, because it allowed the parties to have a better understanding of the issues in dispute:

"It was non-binding method (the ADR procedure that was used). The method used was a meeting to appoint a third man. The third party sat in on the meeting and at the end attended a presentation by the two parties. Then talk. It didn't work out, but I don't think it was a failure of the system. Both parties thought it was worth going through and both understood more. There was a lot of money involved in the dispute. I expect that the mediation cleared the minds. If you have a mediation and no decision is reached, then it may lead to an understanding of the arguments."

Other interviewees could see the benefit of it being non-binding, as it gives the parties the opportunity to withdraw from the ADR process and continue with the formal systems of dispute resolution:

"No, I think it can be useful knowing you can back out if there's a problem. On the other hand, it is a weakness if you are going to spend hours and hours and get nowhere."

Despite the fact that informed respondents and those who have first hand experience of ADR do not consider that the non-binding nature of ADR is a weakness, for an indicative number of the respondents to the survey it is a significantly held negative perception. This is one area that the proponents of ADR need to concentrate if they wish to alter opinions and encourage the development of ADR. It is also an area the opponents of ADR can utilise to their advantage by fostering reservations about the use of ADR.

1.6 SUMMARY OF THE TOTAL SURVEY RESPONSE TO THE NEGATIVE PERCEPTIONS ABOUT ADR.

Of the four negative statements about ADR, the total survey respondents only significantly agree with two. The perception that **Using ADR is a sign of weakness** has a significant level of disagreement from contractors and it is suggested that this is not a factor which is influencing the respondents' use of ADR. The perception that **ADR reveals too much of the case to the opposition** receives little support from the respondents, who are neutral about the statement. The perception that **ADR is used to create delay** has a weak significant level of agreement. The comments made by the respondents and the follow-up interviews provide ample evidence that there is an awareness about the possibility of its tactical use to create delay, particularly from sub/specialist contractors. It is believed that the perception that ADR is used to create delay is facilitated by the perception that the **weakness of ADR is that it is non-binding**. The respondents perceive that because ADR is non-binding it may be used to create delay because one party is able to go through an ADR procedure then refuse to accept the final decision or refuse to reach any agreement, which results in the parties having to continue the dispute through the formal procedures.

The negative perception which received a highly significant level of agreement by the survey population is **ADR is non-binding. This is a weakness.** This result is extensively corroborated by the respondents' comments and the follow-up interviews. These findings are supported by the attitudes of the respondents who had refused to use ADR or had a proposal to use it rejected. The only statement these respondents significantly agree with is the negative perception that they did not wish to use a non-binding procedure. It is likely that this negative perception is one of the major factors which is currently restricting the development of ADR by main contractors and sub/specialists.

The following section investigates whether there are any differences in the sub groups of "contractor type" or "turnover size" in their attitude to the negative perceptions.

2 SECTION 2

DIFFERENCES BETWEEN GROUPS ON THE NEGATIVE PERCEPTIONS

As described in the previous chapter, the MANOVA procedure was run on an item pool of attitudes about ADR, which included the negative statements, and tested for three effects: (i) interaction between "contractor type" by "turnover size" (ii) effect of "contractor type" and (iii) the effect of "turnover size".¹⁴ This section analyses the differences between groups on the negative perceptions.

2.1 Interaction between "contractor type" and "turnover size" on the negative perceptions

As reported previously, the MANOVA procedure for the interaction between "contractor type" by "turnover size" on the item pool did not yield a significant result.¹⁵ When the individual statements for the negative perceptions were inspected, none is significant at the 0.05 level. There is no interaction between "contractor type" by "turnover size" on the negative perceptions.

¹⁴ Chapter 4 section 2 paras. 2.1-2.1.2

¹⁵ Chapter 4 section 2 para. 2.2.1

2.2 Effect of "contractor type"

The MANOVA test statistic indicates that there is no statistically significant effect of "contractor type" on the item pool of attitude statements.¹⁶ When the negative perceptions were inspected, the individual test statistic for the statement **ADR can be used to create delay** is ($F = 4.45$; $df = 1/159$; $p = 0.036$). This indicates that there is a significant difference at the 0.05 level for "contractor type" on this statement. No other negative statement is statistically significant at the 0.05 level.

Thus, there is no significant difference between main contractors and sub/specialist contractors for the remaining negative perceptions: **Using ADR is a sign of weakness: Contractors significantly disagree with the statement. ADR reveals too much of the case to the opposition: Contractors are neutral about this statement. Finally, The weakness of ADR is that it is non-binding: Contractors significantly agree with the statement.**

Figure 52: ADR can be used to create delay by "contractor type".

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Row total
Main contractor	5 4.6%	25 23.1%	52 48.1%	24 22.2%	2 1.9%	108 54.3%
Sub-contractor	3 3.3%	26 28.6%	44 48.4%	17 18.7%	1 1.1%	91 45.7%
Column total	8 4%	51 25.6%	96 48.2%	41 29.6%	3 1.5%	199 100%

Cross-tabulation for frequency and percentage for "contractor type" on the statement: ADR can be used to create delay.

An inspection of a cross-tabulation (figure 52) for the statement **ADR can be used to create delay by "contractor type"** exposes an interesting balance between main contractor and sub/specialist contractor. There is a similar level of neutrality from both sectors, 48.1% and 48.4% respectively. However, only 19.8% of sub/specialist contractors

¹⁶ Chapter 4 section 2 para. 2.2.2

disagree (disagree + strongly disagree) (18.7% + 1.1%) with the statement that **ADR can be used to create delay** compared to 24.1% (disagree + strongly disagree) (22.2% + 1.9%) of main contractors. This results is reversed for agreement with the statement. 27.7% of main contractors agree (strongly agree + agree) (4.6% + 23.1%), compared to 31.9% (strongly agree + agree) (3.3% + 28.6%) of sub/specialist contractors.

It was previously reported¹⁷ that the survey population significantly agree with this statement, albeit at a weak level. This awareness of using ADR to create delay was particularly alluded to in the interviews by sub/specialists contractors, who affirmed that they are vitally concerned with the issue of delay. These findings substantiate the results for this statement. Further, it has been noted that sub/specialists are found to differ significantly from main contractors on the statement **Construction disputes need a quick decision**.¹⁸ Both agree, but sub/specialist agree significantly more.

The reported observed mean for the survey population on the perception that **ADR can be used to create delay** is 2.90, (95 % CI: 2.75 - 2.99),¹⁹ which is a significant but not high level of agreement. The observed mean for sub/specialists is 2.80 (CI: 2.64 - 2.98), which is a significant level of agreement. The mean for main contractors is 2.86 (CI: 2.71 - 3.03), which is neither significantly agreeing or disagreeing. The MANOVA test indicates that there is a significant difference between "contractor type". This negative perception is more strongly held by sub/specialists and may be highly influential in their decision to use ADR when in dispute with a main contractor.

As noted earlier,²⁰ some specialist contractors alluded to the possibility of more sinister motives about the use of ADR. Concerns were expressed about "*blacklisting*" and "*bullying tactics*". The advantages of ADR were acknowledged where it is important to

¹⁷ Chapter 5 section 1 para. 1.4

¹⁸ Chapter 4 section 2 para. 2.3.2

¹⁹ Chapter 5 section 1 para 1.4

²⁰ Chapter 5 section 1 para. 1.4

continue a business relationship. For all other disputes, one sub/specialist declared that *"ADR is no more than a bullies' charter."* Doubts were expressed that ADR would even be considered by main contractors who are concerned with covering losses or making profits from their tender price.

"(The use of ADR) needs the agreement of the main contractor and this may not be forthcoming if he expects his margin from 'sub-contractor bashing'."

There is some suggestion from sub/specialists contractors that ADR could be used as a strong-arm tactic to force settlement and that it would only become part of the general manipulation tactics which are employed in the dispute resolution process already:

"It is an avenue where, if people are intent on settling a dispute, that means it could be used, but if they don't mean to settle but would purely use it as means to browbeat the other side into submission. If they did not submit, they would take them to law."

It is likely the perception that ADR can be used to create delay is a major factor which is influencing the use of ADR by main contractors and sub/specialist contractors. Both parties must agree to use ADR in any dispute. If sub/specialist contractors perceive that ADR is just another dispute resolution tool which is being manipulated by the main contractor in order to create delay, they will not consider using it. The results of the MANOVA test indicate that main contractors and sub/specialist contractors differ significantly on this issue. Sub/specialist contractors agree with the negative perception that ADR can be used to create delay, whereas main contractors are neutral. The manipulation of the formal systems were discussed earlier.²¹ Sub/specialist contractors admitted to using the formal systems to force the main contractor to take the dispute seriously and to attempt to force along a settlement. If ADR is unable to help in this process, sub/specialists are unlikely to use it. This is confirmed by the views of the sub/specialists who were interviewed:

²¹ Chapter 4 section 1 para. 1.1.5

"I think, regrettably in this industry, people only think you are being serious if you take it seriously and do something formally. I think that non-binding ADR, in my view, would be seen as...well that's good, it bought me another three or four months and if I don't like the result at the end of it, well, it doesn't matter any way."

The perceived problem with ADR, which is seen by sub/specialist contractors, is that it can be used as a delaying tactic by main contractors because it is non-binding. One party can agree to its use in order to gain time and then reject the decision at the end of the process. This particular problem was cited as a specific reason for rejecting ADR on a number of occasions by one sub/specialist contractor, who was interviewed:

"Most people want to get a result. If it's between two good friends and they happen to have a bit of the dispute then I think it's a great idea, any of the different types. That is really what I was saying. If as sub-contractor we have a dispute with, say Tarmac, the biggest contractor in the land, and we want them to pay us £1 million and they don't feel like paying us £1 million, it's a good idea for them to say, 'Well let's try ADR.'. They could do that to spill it out, sap our strength and in the end, decide, well, we don't agree with this mediator, or whatever, 'We're not going to pay you.' We will have to use the terms of the contract and, of course, litigation or whatever. That's what I feel would happen. It has been suggested to us a couple of times that we use ADR and both times I rejected the idea because I didn't feel the other side would use it in the way it was intended." (Emphasis provided)

2.3 Effect of "turnover size" on the negative perceptions.

The MANOVA test statistic for the effect of "turnover size" on the attitude statements is ($F = 1.43$; $df = 74/248$; $p = 0.022$), which indicates that there is a significant effect of "turnover size" at the 0.05 level on the attitude statements.²² The individual test statistics for the negative statement **ADR can be used to create delay** is ($F = 3.95$; $df = 2/159$; $p = 0.021$), which indicates that there is a significant effect of "turnover size" at the 0.05 level. When the post hoc Scheffé test is performed, no turnover group is significantly

²² Chapter 4 section 2 para. 2.2.3

different at the 0.05 level.

Figure 53: Cross tabulation ADR can be used to create delay by "turnover size".

Frequency %	strongly agree	agree	neutral	disagree	strongly disagree	Total
£6million-	2 2.4 %	21 25 %	42 50 %	18 21.4 %	1 1.2 %	84 44.7 %
£50 million-	5 8.9 %	10 17.9 %	31 55.4 %	10 17.9 %	0 0 %	56 29.8 %
£ 5 0 million+	1 2.1 %	20 41.7 %	18 37.5 %	8 16.7 %	1 2.1 %	48 25.5 %
Column total	8 4.3 %	51 27.1 %	91 48.4 %	36 19.1 %	2 1.1 %	188 100 %

Cross tabulation of frequency and percentage for "turnover size" for the statement: ADR can be used to create delay.

Although the Scheffé test does not suggest that there is a significant difference at the 0.05 level, it is interesting to note that 43.8% of the respondents in the largest turnover category (£50 million and over) agree (strongly agree + agree) (2.1% + 41.7%) with the statement that **ADR can be used to create delay**. (Figure 53) This is a considerably higher percentage than the 27.4% agreement (strongly agree + agree) (2.4% + 25%) recorded for respondents with a turnover of £6 million and under and the 26.8% (strongly agree + agree) (8.9% + 17.9%) for the middle turnover group.

The observed mean for the total survey is 2.85, which is a weak significant level of agreement.²³ The observed mean for the smallest turnover group is 2.92, (CI: 2.75 - 3.10) and for the middle category it is 2.82 (CI: 2.60 - 3.04). Both these results indicate that the groups neither agree nor disagree. The observed mean for the largest turnover group is 2.75 (CI: 2.49 - 2.95), which is a weak significant level of agreement with the statement that **ADR can be used to create delay**.

The findings suggest an awareness on the part of large contractors that ADR may indeed

²³ Chapter 5 section 1 para. 1.4

be manipulated in order to create a delay. When this result is aligned with the finding that sub/specialist contractors significantly agree that ADR can be used to create delay, it is likely that this is a pivotal factor in the infrequent use of ADR by contractors in the construction industry. The indicator interviews suggest that the majority of disputes are between main contractors and sub/specialist contractors.²⁴ Many of these disputes can be with large organisations, which perceive that ADR has the potential for delay. Thus sub/specialist contractors, who are particularly sensitive to the problem of delay, will be reluctant to use ADR in these disputes. This is supported by the interviews and the respondents' comments to the survey, which evidenced a high level of concern that ADR could be used by main contractors against the best interests of the sub/specialist contractor. One highly specialised sub-contractor who was interviewed asserted that he is becoming increasingly cynical about the potential use of ADR for creating delay by main contractor:

"So I can actually see that big contractors try to use ADR because I think it's another delaying tactic to not pay sub-contractors their legitimate monies and not to pay them on time etc."

The effect of this concern is that contractors who hold this perception are likely to prefer a binding dispute resolution procedure. The results reveal that the respondents neither agree nor disagree that arbitration is satisfactory and it is suggested that the reforms of arbitration under the 1996 Arbitration Act may bring the allegiance of contractors back to this procedure. It has the advantage of being binding, which is, clearly, an important consideration for some sectors of contracting.

This view is supported by evidence from the follow-up interviews. One sub/specialist contractor illustrated the circumstances when he would not consider using ADR.

It was decided not to use mediation, on one particular occasion, because his organisation was looking for money, because ADR was non-binding and because it was perceived that the main contractor could utilise mediation to delay. The opposition, who were not

²⁴ Chapter 3 para. 4.1.4

looking for money, could delay and at the same time discover the sub-contractor's case. The final decision was that arbitration was the preferred procedure.

"Since we were looking for money and they weren't, they could afford to sit back and see what we had to say, without any commitment on their part. So they could use up a few months, six months or however long it takes and decide the strengths or weaknesses of our case and decide whether they should ultimately settle or fight a proper action. We just didn't think it was for us. If they had agreed to be bound by the mediation process we would have gone ahead but, of course, that defeats the object, because you might as well go to an arbitrator if you are going to insist that it's binding. If you insist that it's binding, you must also insist then that he is properly briefed, not just that he gets an impression, and he thinks he likes the colour of this guy. If you are going to give it to somebody to decide and it is binding, then that can only be somebody who is qualified to bind the parties. It can only be if he is fully in possession of the whole facts and circumstances, which is what arbitration is all about."

For many sub/specialist contractors, if ADR merely creates more delay in settlement and more costs because it is non-binding, the formal systems should be used in the first place. This view is confirmed by one sub/specialist interviewee:

"Well, if it is on that basis, that it is not a binding decision, then I question whether it's really going to be worthwhile. Because if you don't get a decision on ADR and you spend cash, you might as well have gone straight to arbitration and used that money to fund that part."

It is also virtually certain that when the Housing Grants, Construction and Regeneration Act 1996 comes into force and the parties have the 'right' to refer to adjudication, there will be an increase in the use of binding adjudication, which is likely to be chosen before non-binding forms of ADR. The Act provides a strict timetable for the adjudicator to reach a decision, which is likely to be attractive to those contractors who are particularly

concerned with delay.²⁵

3 SECTION 3

PUTTING ADR CLAUSES IN CONSTRUCTION CONTRACTS.

Earlier,²⁶ it was suggested that the perception that ADR should be put on a more formal footing was probably connected to two issues: first, the non-binding nature of ADR and second, putting ADR clauses into contracts. The respondents were asked to indicate how much they agree or disagree (1 = strongly agree to 5 = strongly disagree) with inserting the following ADR clauses into construction contracts: mediation, conciliation, adjudication, Dispute Review Board (DRB) and the Executive Tribunal. A space was left for respondents to assess other types of ADR procedures, but no other procedure was mentioned in sufficient numbers to be statistically analysed.

Figure 54: Putting mediation clauses into construction contracts.

	strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	21	72	62	12	10	177
%	11.9%	40.7%	35%	6.8%	5.6%	100%

Cross-tabulation: Frequency and percentage of responses for the total sample for the statement: How much you agree or disagree with putting mediation clauses into contracts.

Figure 54 shows that 52.6% of respondents agree (strongly agree + agree) (11.9% + 40.7%) with the statement about inserting **mediation clauses into construction contracts**. The observed mean for this statement is 2.55 (SE mean 0.07) (95% CI: 2.40-2.70) which indicates that the respondents significantly agree with the statement.

²⁵ Chapter 2 paras. 4.3-4.3.1

²⁶ Chapter 4 section 1 para 1.2.4

Figure 55: Putting conciliation clauses into construction contracts.

	strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	16	73	68	10	8	175
%	9.1%	41.7%	38.9%	5.7%	4.6%	100%

Cross-tabulation: Frequency and percentage of responses for the total sample for the statement: How much you agree or disagree with putting conciliation clauses into contracts.

Figure 55 shows that 50.8% of the respondents agree (strongly agree + agree) (9.1% + 41.7%) with the statement about **putting conciliation clauses into construction contracts**. The observed mean is 2.59 (SE 0.07) (95% CI: 2.45-2.72) which suggests that the respondents significantly agree with the statement.

Figure 56: Putting adjudication clauses into construction contracts.

	strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	21	83	52	11	8	175
%	12%	47.4%	29.7%	6.3%	4.6%	100%

Cross-tabulation: Frequency of responses for the total sample for the statement: How much you agree or disagree with putting adjudication clauses into contracts.

Figure 56 shows that 59.4% of the respondent agree (strongly agree + agree) (12% + 47.4%) agree with the statement about **putting adjudication clauses into construction contracts**. The observed mean is 2.46 (SE. 0.07) (95% CI: 2.32-2.60) which reveals a significant level of agreement. The respondents agree more with the statement about inserting adjudication clauses into construction contracts than any other type of ADR procedure. (Compare figures 54 and 55)

Figure 57: Putting DRB clauses into construction contracts.

	strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	7	38	82	30	14	171
%	4.1%	22.2%	48%	17.5%	8.2%	100%

Cross-tabulation: Frequency and percentage of responses for the total sample for the statement: How much you agree or disagree with putting DRB clauses into contracts.

In comparison to the previous statements regarding ADR contract clauses, only 26.3% of respondents agree (strongly agree + agree) (4.1% + 22.2%) with the statement about putting DRB clauses into construction contracts and 48% are neutral. (Figure 57) The observed mean is 3.03 (SE mean 0.07) (95% CI: 2.89-3.18) which indicates that the respondents are neutral about inserting DRB clauses into construction contracts.

Figure 58: Putting Executive Tribunal clauses into construction contracts.

	strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	10	46	84	17	14	171
%	5.8%	26.9%	49.1%	9.9%	8.2%	100%

Cross-tabulation: Frequency and percentage of responses for the total sample for the statement: How much you agree or disagree with putting Executive Tribunal clauses into contracts.

Figure 58 shows that 49.1% of respondents are neutral with the statement about putting Executive Tribunal clauses into construction contracts and only 32.7% agree (strongly agree + agree) (5.8% + 26.9%). The observed mean for this statement is 2.90 (SE mean 0.07) (95% CI: 2.76-3.05) which indicates that the respondents do not significantly agree or disagree with putting Executive Tribunal clauses into contracts.

3.1 Differences between groups

The MANOVA test was run on these five statements about inserting ADR clauses into construction contracts in order to test for the interaction between "contractor type" by "turnover size", the effect of "contractor type" and the effect of "turnover size". The test

did not yield a significant test statistic at the 0.05 level for any group and, therefore, the survey sample agree, generally, with putting mediation, conciliation and adjudication clauses into construction contracts but are neutral about inserting DRB clauses and Executive Tribunal clauses. The comments and follow-up interviews support this finding. As one sub-contractor asserted in the space provided for comments following these five statements:

"Mediation, conciliation and adjudication are relatively low cost. The Dispute Review Board seems cumbersome and Executive Tribunal seems sensible."

Contractors who agree with including ADR clauses in construction contracts believe that the use of these clauses will help prevent the parties pursuing costly litigation or arbitration and the use of ADR before this stage may help to clarify the issues in dispute:

"The contract should have an alternative dispute resolution process in order to prevent some disputes progressing to litigation/arbitration without first attempting a third party resolution and by allowing discussion of the issues in dispute."

As discussed above the proponents of ADR suggest that some people perceive that using ADR is a sign of weakness and recommend that this perception can be overcome by putting ADR clauses into contracts. The survey results show that the respondents do not significantly agree with the statement that **using ADR is a sign of weakness** and there is a significant level of agreement with the statements about inserting mediation, conciliation and adjudication clauses into contracts. The results suggest that the proponents of ADR are using a fallacious argument to encourage ADR and, that if they wish to persuade contractors to use ADR or put ADR clauses into contracts, then they should address the negative perceptions which are held by contractors: **ADR can be used to create delay and the weakness of ADR is that it is non-binding.**

4 SECTION 4

ANALYSIS OF THE SECOND AND THIRD HYPOTHESES

The second and third hypotheses were investigated in this chapter. The second hypothesis

is: **Main contractors and sub/specialist contractors hold negative perceptions about ADR.** The findings of the survey indicate that two negative perceptions are significantly held by the survey population: **The weakness of ADR is that it is non-binding and ADR can be used to create delay.** The findings of this chapter conclude that the other negative perceptions tested are not generally held by contractors. Statistical tests did not show that there are any effects for "contractor type" or "turnover size". Therefore, contractors neither agree nor disagree with the statement that **ADR reveals too much of the case to the opposition** and contractors significantly disagree with the statement that **Using ADR is a sign of weakness.** It is not believed that these two negative perceptions are influencing the choice of ADR by either main or sub/specialist contractors.

Statistical tests did not suggest that there is a significant level of difference for either "contractor type" or "turnover size" for the negative perception that **ADR is non-binding, this is a weakness.** Generally, this negative perception is held by both types of contractors and by all sizes of contractors. This confirms, in part, the first hypothesis that negative perceptions are held by main contractors and sub/specialist contractors. It is concluded that this is a pivotal factor involved in the development of the use of ADR. It is an issue which must be addressed by the proponents of ADR if it is to gain in use. It is suggested that *contractors may continue to use arbitration, particularly if the reforms of the 1996 Arbitration Act are perceived by them to address their major concerns about costs, speed and an adversarial approach.* This factor may be important also in the development of adjudication as a dispute resolution process.

The MANOVA test indicates that there is a significant difference between "contractor type" on the statement that **ADR can be used to create delay.** Sub/specialist contractors significantly agree with this negative perception, but main contractors do not significantly agree or disagree. ADR is perceived to create delay because it allows one party to agree to use it, then to refuse to accept the decision or to refuse to reach a settlement and thus, to force the other party to continue with the formal procedures, having lost several months in the process. This perception will negatively influence the choice of ADR by sub/specialists, who are likely to choose a binding dispute resolution procedure in preference to a non-binding one.

The MANOVA test statistic also indicates that there is a significant difference between "turnover size" in relation to the statement **ADR can be used to create delay**.

Although the post hoc Scheffé test did not find any statistical difference at the 0.05 level, it is noted that respondents with a turnover of £50 million and over have a high level of agreement with the statement. This is an important consideration in the potential development of ADR. Sub/specialist contractors are likely to be in dispute with large contractor organisations and if the sub/specialists hold a negative perception about ADR being used for delay, it is unlikely that they will choose it to help resolve those dispute.

The third hypothesis of the thesis is: **Negative perceptions about ADR influence the choice of dispute resolution by main contractors and subcontractors**. Having confirmed that two negative perceptions are held by contractors, other evidence from the survey suggests that these perceptions are influential in the choice of ADR. When respondents were asked if they would consider using ADR, over 70% state that they would. When the comments on this decision are analysed, they disclose that one concern is that ADR would be used because it is quicker than the formal procedures.²⁷ If there is a perception that ADR is used by the other party to prolong the dispute, ADR is unlikely to be considered. Further, the follow-up interviews and other general comments made by respondents reveal that there is extensive concern with both delay in reaching settlement and the non-binding nature of ADR. These are perceptions which will influence negatively the choice of ADR as a dispute resolution procedure. The interviewees' and respondents' comments support the view that this is a major factor influencing the choice of ADR. Further, they provide evidence that many contractors believe that the formal systems should be used in the first place because of problems caused by manipulating delay, which is exacerbated by the non-binding nature of ADR. These findings confirm the third hypothesis. Some negative perceptions are influencing the choice of ADR by contractors.

The findings of the survey have discovered that negative perceptions are held in the contracting sector of construction. It is likely that these attitudes will influence the

²⁷ Chapter 4 section 3 paras. 3-3.3

development of the use of ADR. The following chapter assesses whether other factors are influencing the choice of ADR by appraising the respondents' perceptions about the appropriateness of ADR to resolve construction disputes and the potential effect these have on its choice as a dispute resolution procedure.

CHAPTER 6

FACTORS INFLUENCING THE CHOICE OF ADR

The evidence from the literature search confirmed that there was little use of ADR in the UK construction industry.¹ Therefore, one objective of the survey is to find out if there are any specific factors influencing main and sub-contractors' choice of ADR as a dispute resolution process. The previous chapter explored the negative perceptions of ADR, which, it had been hypothesised, are influencing the development and choice of ADR by contractors. The conclusions drawn from the statistical results are that both types of contractors' hold negative perceptions that a weakness of ADR is that it is non-binding and that ADR can be used to create delay. It is concluded that these are influential factors on the choice of ADR to resolve construction dispute. When statistical tests of difference were performed, to find if groups differ significantly from each other in the negative perceptions, it was found that there is a significant difference in contractor type in the perception that ADR can be used to create delay; whereas main contractors neither agree nor disagree, sub/specialist agree. It is concluded that this is a factor which will influence the choice of ADR by sub/specialist contractors. This chapter explores other possible factors which may explain the limited use of ADR, in order to assess their potential impact on the choice of ADR by contractors.

The literature search and the indicator interviews led to the formulation of a theory that one factor which was involved in the decision not to choose ADR is the perceived appropriateness of it to resolve certain construction disputes. If one or all of the parties do not believe that it is appropriate for the dispute in question, this would be influential on its choice. One of the objectives of the postal survey was to test the respondents' perceptions of the appropriateness of ADR to settle construction disputes. For example: there is a suggestion in the indicator interviews and some of the literature that ADR is suitable for financially small disputes only;² This perception was tested in the survey. Another attitude, which is identified as being held by some sectors of the construction

¹ This is confirmed by the results of the postal survey. See chapter 4 section 3 para. 3.2

² Chapter 2 para. 6.3

industry, is that adjudication is the preferred ADR procedure for the construction industry.³ Again, this attitude was tested in the survey.⁴

1 SECTION ONE

FINANCIAL SIZE OF DISPUTE

The indicator interviews and the literature search suggested that there are perceptions held in the construction industry that ADR is suitable for certain financial sizes of dispute only. The suggestion in the indicator interviews is that the smaller financial sizes of disputes are more suitable and that larger disputes are served better by the formal systems of litigation and arbitration. It would be impossible to state what would be regarded as small or large for any individual person or organisation. Therefore, it was decided to test the area of the appropriateness of ADR to financial dispute size by two different methods: First; statements about the suitability of ADR to financial sizes of disputes were put in with the attitude item pool⁵ and the respondents were asked to assess their level of agreement with these statements on a scale of 1 = strongly agree to 5 = strongly disagree. The three statements which were tested in this way were:

- (i) ADR is only suitable for small disputes - under £100,000
- (ii) ADR is more suitable for disputes under £100,000
- (iii) ADR is suitable for any size of dispute.⁶

The dispute level of £100,000 was decided on as it had been discussed in the indicator

³ Chapter 2 para. 4.2.3

⁴ Since the questionnaire and the follow-up interviews, the Housing Grants, Construction and Regeneration Act 1996 has been enacted. When implemented, this will make adjudication a statutory right in construction contracts and binding to the end of the contract. See chapter 2 paras 4.2.3-4.3.1

⁵ Appendix 1. Questionnaires

⁶ The statement ADR is suitable for any size of dispute was asked twice in a later position in the item pool of statements. These two statements were highly correlated (Pearson correlation coefficient = 0.742, n = 197, p < 0.001) and a paired t-test showed no significant difference between the means (t = 1.16, df = 196, p > 0.05).

interviews as constituting the upper limit of a small disputes.

The second method chosen, to test the possible influence of the financial size of dispute in the choice of ADR, was to ask the respondents to complete a grid of questions.⁷ The indicator interviews had suggested that different dispute resolution procedures are more suitable at different financial sizes. For example, large disputes are more suitable for litigation and smaller ones for mediation. The purpose of the grid was to discover if the respondents perceive that certain dispute resolution procedures are more suitable than others for the resolution of different financial sizes of disputes. Further, a grid of questions was developed in order to avoid lengthy questions and aid clarity and understanding.

The respondents were asked to assess the level of suitability (from 1-5) for seven different procedures at five different financial sizes of dispute. For example, the respondents were asked to assess the suitability of mediation to resolve disputes with a financial size of (i) over £5 million, (ii) £1-5 million, (iii) £250,000 to under £1million, (iv) £50,000 to under £250,000 and (v) under £50,000. The respondents were advised that 1 = very suitable and 5 = very unsuitable. The different financial sizes of disputes were determined using three considerations:

- (i) Discussions with a qualified arbitrator and mediator.
- (ii) Discussions with a representative of NSCC (National Specialist Contractors Council).
- (iii) Opinions expressed in the indicator interviews.

The dispute resolution procedures which were assessed in this way were:

adjudication,
conciliation,
mediation,

⁷ Appendix 1 Questionnaires Question 10.

Dispute Review Board (DRB),
Executive Tribunal,
litigation,
arbitration.

The ADR procedures were chosen because they had been referred to in the literature and the indicator interviews and it was concluded, therefore, that they would be the most familiar to the construction industry. Litigation and arbitration were included, in order to compare the respondents' perceptions of the formal systems to the chosen ADR procedures. A space was provided on the grid to allow the respondents to specify any other type of dispute resolution procedure and assess it accordingly. No other procedures were designated in sufficient numbers to enable them to be analysed.

1.1 Item pool statements on financial size of dispute.

The respondents were asked to assess their level of agreement to the statement: **ADR is only suitable for small disputes under £100,000.**

Figure 59: ADR is only suitable for "small" disputes under £100,000.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	5	37	89	51	18	200
%	2.5%	18.5%	44.5%	25.5%	18%	100%

Cross tabulation of frequency and percentage for the survey respondents for the statement: ADR is only suitable for "small" disputes - under £100,000.

Figure 59 indicates that 44.5% of the respondents are neutral about the statement that **ADR is only suitable for "small" dispute under £100,000** and 43.5% disagree (disagree + strongly disagree) (25.5% + 18%). The observed mean for this statement is 3.20 (SE 0.07) (95% CI: 3.08 - 3.35). There is a 95% confidence level that the total sample disagree with the statement, which is a significant level of disagreement. The respondents do not significantly hold the perception that ADR is suitable for "small" disputes only.

In order to assess whether the respondents hold the perception that ADR is more appropriate for smaller financial dispute rather than disputes which are over £100,000, the respondents were asked to gauge their level of agreement to the statement: **ADR is more suitable for disputes under £100,000.**

Figure 60: ADR is more suitable for disputes under £100,000

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	4	42	104	46	5	201
%	2%	20.9%	51.7%	22.9%	2.5%	100%

Cross tabulation of frequency and percentage for the survey respondents for the statement: ADR is more suitable for disputes under £100,000.

Figure 60 shows that over half the respondents (51.7%) are neutral about the statement that **ADR is more suitable for disputes under £100,000.** The observed mean for the statement is 3.04 (SE 0.06) (95% CI: 2.93 - 3.17), which indicates that the respondents do not significantly agree or disagree with the statement.

Finally, the respondents were asked to measure their level of agreement with a further statement about the appropriateness of ADR for the size of financial dispute: **ADR is suitable for any dispute size.**

Figure 61: ADR is suitable for any size of dispute.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	15	64	87	27	6	199
%	7.5%	32.2%	43.7%	13.6%	3%	100%

Cross tabulation of frequency and percentage for the survey respondents for the statement: ADR is suitable for any dispute size.

Over a third of the respondents agree, 39.7% (strongly agree + agree) (7.5% + 32.2%), with the statement that **ADR is suitable for any size of dispute.** (Figure 61) The observed mean is 2.72 (SE 0.06) (95% CI: 2.55 - 2.78). There is a 95% confidence level

that the respondents agree with the statement. There is a high level of neutrality about the statement (44.5%), which is the same for other statements regarding the suitability of ADR to financial size of dispute. (See figure 60 (51.7%) and figure 59 (43.7%) respectively).

The results for the total respondents suggest that they do not perceive that the usefulness of ADR is limited to disputes which are under £100,000 in financial size. Further, the respondents perceive that ADR is suitable for any dispute size. The respondents are not significantly in agreement or disagreement with the statement that ADR is more suitable for dispute under £100,000. In order to assess if there are any group differences, the MANOVA test statistics for the attitude statements were analysed.

1.2 Group differences.

The MANOVA procedure was run on the item pool of attitudes, which included the three statements regarding the appropriateness of ADR to financial sizes of disputes. The objective of the MANOVA procedure was to assess any difference of three effects:

- (i) interaction between "contractor type" by "turnover size".
- (ii) effect of "contractor type"
- (iii) effect of "turnover size".

1.2.1 Interaction between "contractor type" by "turnover size" to the suitability of ADR to the financial "dispute size".

The MANOVA test statistic for the interaction between "contractor type" by "turnover size" on the item pool of statements does not yield a significant test result⁸ and the individual test statistics for the statements regarding the suitability of ADR to size of financial dispute are not significant at the 0.05 level. However, two statements are significant at the 0.10, which are reported, as they indicate a trend.

⁸ Chapter 4 section 2 para. 2.3.1

(i) **ADR is only suitable for small disputes under £100,000.**

The test statistic for **ADR is only suitable for small disputes under £100,000** is ($F = 2.59$; $df = 2/159$; $p = 0.08$), which indicates a trend at the 0.10 level of significance for an interaction between "contractor type" by "turnover size". In order to interpret where the trend lay, a multiway table of observed means for "contractor type" and "turnover size" is given below.

Figure 62: Multiway table of observed means for the statement: ADR is only suitable for disputes under £100,000.

"Turnover size"	Main/sub contractor		Group mean Mean
	Main contractor	Sub contractor	
	Mean	Mean	
£6 million and under	2.94	3.10	3.04
Under £50 million but over £6 million	3.35	3.19	3.28
£50 million and over	3.66	2.90	3.50
Group total	3.33	3.11	3.23

Cross tabulation of observed means for "contractor type" by "turnover size" for the statement: ADR is only suitable for disputes under £100,000

When the observed means in figure 62 are considered, it is apparent that, as the turnover group size increases, main contractors are more in disagreement than sub/specialists with the statement that **ADR is only suitable for disputes under £100,000**. There is a notable difference in response between main contractors in the largest turnover category, who strongly disagree (3.66) with the statement and main contractors in the smallest turnover group, who marginally agree with the statement (2.94). There is also a difference in response for main contractors and sub/specialist contractors in the largest turnover group. (The observed means are 3.66 and 2.90 respectively) Main contractors with a turnover of £50 million and over have a high level of disagreement with the statement, whereas sub/specialist contractors merely agree. However, the number of subjects which fit into the sub-group of sub/specialist contractor in the largest turnover

category is small.⁹ Therefore, the result is only noted to indicate a trend. Most groups of "contractor type" by "turnover size" disagree with the statement that **ADR is only suitable for disputes under £100,000**, but there is a trend for main contractors in the smallest turnover group and sub/specialists in the largest turnover group to agree with the statement. Main contractors with a turnover of under £6 million and sub/specialists with a turnover of £50 million and over are less likely to perceive that ADR is suitable for disputes over £100,000.

(ii) **ADR is suitable for any dispute size.**

The MANOVA test statistic for the statement **ADR is suitable for any dispute size** is ($F = 2.56$; $df = 2/159$; $p = 0.08$), which is reported, as it indicates a trend at the 0.10 level for an interaction between "contractor type" by "turnover size". In order to interpret where the trend lay, a multiway table of observed means for the statement is produced.

Figure 63: Multiway table of observed means for the statement **ADR is suitable for any size of dispute** by "contractor type" and "turnover size".

Categories of turnover size	Main/sub contractor		Group mean Mean
	Main contractor	Sub contractor	
	Mean	Mean	
£6 million and under	2.66	2.73	2.70
Over £6 million - under £50 million	2.87	2.72	2.80
£50 million and over	2.50	3.10	2.62
Group total	2.66	2.77	2.71

Cross tabulation of observed means for "contractor type" by "turnover size" for the statement: ADR is suitable for any size of dispute.

When the observed means are interpreted to analyse the interaction between "contractor type" by "turnover size", it is noted that sub/specialist contractors in the largest turnover category disagree with the statement (3.10) that **ADR is suitable for any sizes of**

⁹ 10 respondents

dispute, whereas all the other groups agree with the statement. (See figure 63) When the observed means are compared between main contractors and sub/specialists in the largest turnover group, there is a very large difference, 2.50 and 3.10 respectively. This is a difference of perception. Main contractors in the largest turnover group are in agreement with the statement that ADR is suitable for any size of dispute, whereas sub/specialist contractors in this turnover group disagree. However, as noted above, this group is small.¹⁰ The result is reported as an explanation for the test statistic, which indicates that there is a significant difference, and to point to any possible trend in the future. Sub/specialist contractors in the largest turnover category are less likely to perceive that ADR is suitable for all sizes of dispute. When this result is linked to the interpretation of the previous test statistic that **ADR is only suitable for small disputes under £100,000**, it suggests a consistency in the results, in that sub/specialist contractors in the largest turnover group disagree with the statement that ADR is suitable for *any size* of dispute and agree that it is more suitable for disputes under £100,000 in financial size. This difference in perception is likely to be a factor in the choice of ADR for disputes of different financial size for sub/specialist in this turnover category.

1.2.2 Effect of "contractor type" on the appropriateness of ADR to the dispute size.

The MANOVA test statistic for the attitude item pool indicates that there is no statistical difference for the effect of "contractor type".¹¹ Further, when the individual statements about the suitability of ADR to financial sizes of disputes are examined, none has a significant test statistic. There is no effect of "contractor type" on these three statements.

1.2.3 Effect of "turnover size" on the appropriateness of ADR to the financial size of disputes.

The MANOVA test statistic for the effect of "turnover size" on the attitude item pool is ($F = 1.43$; $df = 74/248$; $p = 0.022$), which indicates that there is a significant effect at the 0.05 level. When the three statements are investigated, only one, **ADR is only**

¹⁰ *ibid*

¹¹ Chapter 4 section 2 para. 2.2.2

suitable for small disputes under £100,000, is significant at the 0.05 level. The individual test statistic for this statement is ($F = 4.29$; $df = 2/ 159$; $p = 0.015$). The post hoc Scheffé test indicates that there is a significant difference between respondents with a turnover of £6 million and under and those with a turnover of £50 million and over.

Figure 64: ADR is only suitable for "small" dispute under £100,000 by "turnover size"

Turnover size	strongly agree	agree	neutral	disagree	strongly disagree	Total
£6 million +	1 1.2%	17 20.2%	48 57.1%	14 16.7%	4 4.8%	84 44.4%
£ 5 0 million -	2 3.5%	9 15.8%	22 38.6%	19 33.3%	5 8.8%	57 30.2%
£ 5 0 million +	1 2.1%	7 14.6%	15 31.3%	17 35.4%	8 16.7%	48 25.4%
Column Total	4 2.1%	33 17.5%	85 45%	50 26.5%	17 9%	189 100%

Cross tabulation of frequency and percentage for "turnover size" on the statement: ADR is only suitable for "small disputes" under £100,000.

Figure 64 indicates that 52.1% of respondents in the largest turnover category (£50 million and over) disagree (disagree + strongly disagree) ($35.4\% + 16.7\%$) with the statement that ADR is only suitable for disputes under £100,000. In comparison, only 21.5% ($16.7\% + 4.8\%$) (disagree + strongly disagree) of respondents in the smallest turnover category (£6 million and under) disagree with the statement and 57.1% are neutral. The observed mean for the smallest turnover category is 3.04 (95% CI: 2.86 - 3.21), which indicates that this group do not significantly agree or disagree with the statement. In comparison, the observed mean for the largest turnover group is 3.50 (95% CI: 3.21 - 3.79) and the observed mean for the middle size of turnover is 3.29 (95% CI: 3.03 - 3.54), which suggests that both these groups significantly disagree with the statement that ADR is only suitable for "small disputes" - under £100,000. This finding implies that the largest turnover groups are more confident that ADR is not confined to small disputes under £100,000, whereas the smallest turnover groups neither agree nor

disagree.

1.3 Summary

The results of the statistical tests on the attitude statements on the suitability of ADR to the financial sizes of dispute demonstrate that the sample disagree with the statement that **ADR is only suitable for disputes under £100,000**. When differences between groups are statistically analysed, there is a trend for an interaction between "contractor type" by "turnover size". The observed means indicate that, as the size of turnover category for main contractor increases, the sub-group become more opposed to this statement. Further, both main contractors in the smallest turnover group and sub/specialist contractors in the largest turnover category agree with the statement, whereas main contractors in the largest turnover group have a high level of disagreement with the statement. Contractor type alone does not affect the statement, but there is a significant effect of "turnover size". The largest turnover category (£50 million and over) is significantly more in disagreement with the statement than the smallest turnover group (£6 million and under).

The total sample response to the statement that **ADR is more suitable for dispute under £100,000** demonstrates that there is no significant level of agreement or disagreement and statistical tests show that there are no group differences.

The survey response to the statement **ADR is suitable for any size of dispute** indicates that there is a significant level of agreement with this statement, but the MANOVA test indicates that sub/specialists contractors in the largest turnover category significantly differ (at the 0.10 level) from all the other groups. *This group disagree with the statement*, whereas all other groups agree that ADR is suitable for any size of dispute. However, it is noted that there are few subjects in this group.

1.4 Dispute resolution procedure grid

The second method designed to assess the suitability of ADR to different financial sizes of dispute was the development of a question grid, which measures the respondents' perceptions of the level of suitability of different dispute resolution procedures to discrete

levels of financial sizes of dispute. The inferential statistical test used on the data was a multivariate analysis of variance (MANOVA) test for repeated measures.

"When the same variable is measured on several occasions for each subject it is a "repeated measures design." ¹²

The factor which is measured repeatedly is the type of dispute procedure. It has 5 levels, as each procedure is repeated for 5 different financial sizes of dispute. The SPSS MANOVA repeated measures test gives two test statistics for each within-subject factor, using a multivariate F test and an averaged univariate F test.¹³ The univariate test makes assumptions about the homogeneity of variance of the error term. In order to avoid potential 'Type 1 Errors', these assumptions were not made and the multivariate test statistic is given, which is the Pillais statistic.¹⁴ eg; ($F = 1.34$; $df = 48/ 182$; $p = 0.091$).

1.4.1 Results of Multiple Analysis of Variance of repeated measures on the dispute resolution grid.

Although several interactions and effects are tested by this procedure¹⁵ after analysing the results, *only the interaction between "dispute size" by "procedure type" by "contractor type" by "turnover size" and the effect between "dispute size" by "procedure type" are reported.* The objective of the dispute resolution grid is to assess the respondents'

¹² SPSS for Windows Advanced Statistics Release 6.0 (1993) SPSS Inc

¹³ SPSS manual ibid

¹⁴ Chapter 4 section 2 paras. 2.1-2.1.1

¹⁵ Interaction between "procedure type" by "dispute size" by "contractor type" by "turnover size", interaction between "procedure type" by "dispute size" by "contractor type", interaction between "procedure type" by "dispute size" by "turnover size", effect of "procedure type" by "dispute size", interaction between "procedure type" by "contractor type" by "turnover size", effect of "procedure type" by "contractor type", the effect of "procedure type by "turnover size", the effect of "procedure type", interaction between "dispute size" by "contractor type" by "turnover size", effect of "dispute size" by "contractor type", effect of "dispute size" by "turnover size" effect of "dispute size"

perceptions as to the suitability of different procedures to different financial levels of dispute and the chosen interaction and effect achieves this.

1.4.2 Interaction between "dispute size" by "procedure type" by "contractor type" by "turnover size".

The MANOVA repeated measure test statistic for the interaction between "dispute size" by "procedure type" by "contractor type" by "turnover size" is ($F = 1.34$; $df = 48/ 182$; $p = 0.091$). This is reported, as it reveals a trend at the 0.10 level. In order to interpret where this trend lay, the observed means and standard error (SE) means for the sample for each type of dispute procedure at each level of dispute size were listed. (See figure 65) This was then compared with lists of the observed means for each sub-group ("contractor type" by "turnover size"). There were, therefore, 7 lists of observed means and SE means for the perceived levels of suitability of each type of dispute procedure at each level of dispute size:¹⁶

Total sample's observed means,

Main contractors with turnovers of £50 million and over,

Main contractors with turnovers of under £50 million but more than £6 million,

Main contractors with turnovers of £6 million and under,

Sub/specialists with turnovers of £50 million and over,

Sub/specialists with turnovers of under £50 million and over £6 million,

Sub/specialists with turnovers of £6 million and under.

When the observed means for each sub-group are compared with the observed means for the total sample, they reveal that the trend is towards sub/specialist contractors in the largest turnover category (£50 million turnover and over). All the other groups demonstrate little divergence from the observed means of the total sample (within groups) (Reported below) The difference that sub/specialist contractors in the largest turnover category displays in comparison with the other groups is included in the discussion of the

¹⁶ See appendix 5 The observed means and SE means are given for all the sub groups except for sub-contractors with a turnover of £50 million and over, which are given in figure 67.

effect of "dispute size" by "procedure type", but it is noted that there are only 6 (six) subjects in this category. The test statistic is reported as a trend, but the number of subjects for the sub-group is small and any conclusions that are drawn about the difference in response of this sub-group take this into consideration.

1.4.3 Effect of "dispute size" by "procedure type".

The MANOVA repeated measures test statistic for the effect of "dispute size" by "procedure type" is ($F = 8.11$; $df = 24/ 90$; $p = 0.001$), which indicates that there is a significant effect at the 0.05 level on "procedure type" by "dispute size". The sample perceive different types of dispute resolution procedures as being more suitable for the resolution of different financial sizes of disputes. As the interaction between "contractor type" by "dispute size" by "procedure type" is not significant, ($F = 1.31$; $df = 24/ 90$; $p > 0.05$), and the interaction between "turnover size" by "dispute size" by "procedure type" is not significant ($F = 1.10$; $df = 48/ 182$; $p > 0.05$), this indicates that both types of contractors (main contractors and sub/specialist contractors) and all the turnover categories do not differ significantly in their perceptions as to the suitability of different types of dispute procedure to different sizes of dispute. Both types of contractors and all turnover groups perceive that different types of procedures are more suitable for different sizes of dispute. As noted above, there is a trend for an interaction between all four effects, but this will be examined and explained below.

In order to analyse where the significant effect of "procedure type" by "dispute size" lay, the observed means for all the dispute resolution procedures at each financial size of dispute were calculated and listed in descending order of suitability. A 95% confidence interval was also calculated to assess the significance of the perceived level of suitability. The respondents were asked to assess the suitability of each dispute resolution procedure for each "dispute size" on a scale of 1 = very suitable to 5 = very unsuitable. Three (3) is taken as suitable. The null hypothesis is that the mean response is 3 (suitable); therefore, if the 95% CI does not include 3, the sample is significantly different from 3 at the 0.05 level. If the CI lies below 3, the sample perceives the dispute procedure at that size of dispute to be suitable to a significant degree. If the CI lies above 3, the sample perceives the dispute procedure to be significantly unsuitable for that size of dispute.

Figure 65: Observed means and Confidence Intervals for the survey sample respondents for "procedure type" by financial "dispute size".

	Mean	95 % CI	number
Conciliation £50,000-	1.82	1.55, 1.95	144
Mediation £50,000-	1.96	1.73, 2.19	140
Adjudication £50,000-	2.01	1.70, 2.20	143
Litigation £5million+	2.04	1.84, 2.35	140
Mediation £50,000-£250,000	2.14	1.94, 2.37	136
Conciliation £50,000-£250,000	2.18	1.95, 2.37	140
Adjudication £50,000-£250,000	2.21	2.01, 2.44	140
Arbitration £5million+	2.32	2.11, 2.67	142
Arbitration £1-£5million	2.32	2.13, 2.61	142
Litigation £1-£5	2.35	2.18, 2.66	141
Arbitration £250,000-£1million	2.63	2.46, 2.85	140
Mediation £250,000-£1million	2.65	2.45, 2.86	139
Adjudication £250,000-£1million	2.72	2.52, 3.00	142
Conciliation £250,000-£1million	2.76	2.54, 2.97	142
Executive Tribunal £50,000-	2.88	2.60, 3.14	136
Executive Tribunal £50,000-£250,000	2.89	2.68, 3.15	132
Executive Tribunal £250,000-£1million	2.93	2.72, 3.18	134
Litigation £250,000-£1million	3.01	2.80, 3.26	138
Dispute Review Board £50,000-	3.06	2.76, 3.30	136
Dispute Review Board £50,000-£250,000	3.06	2.81, 3.29	134
Dispute Review Board £250,000-£1million	3.09	2.87, 3.33	134
Arbitration £50,000-£250,000	3.13	2.85, 3.33	139
Executive Tribunal £1-5million	3.32	3.04, 3.53	130
Conciliation £1-5million	3.36	3.14, 3.60	137
Adjudication £1-5million	3.37	3.16, 3.64	140
Mediation £1-5million	3.38	3.17, 3.60	134
Dispute Review Board £1-5million	3.50	3.25, 3.71	130
Executive Tribunal £5million+	3.54	3.27, 3.80	129
Arbitration £50,000-	3.59	3.23, 3.81	143
Dispute Review Board £5million+	3.60	3.36, 3.87	129
Adjudication £5million+	3.65	3.38, 3.93	138
Mediation £5 million+	3.68	3.43, 3.93	133
Conciliation £5million+	3.79	3.55, 4.04	136
Litigation £50,000-£250,000	3.80	3.62, 4.05	138
Litigation £50,000-	4.29	4.07, 4.50	140

Table showing the observed means and confidence intervals for the perceived levels of suitability given by the total sample for each type of dispute procedure at each level of financial size of dispute.

An analysis of the list of observed means (figure 65) indicates distinctive but diametrically opposed patterns of responses for the total sample for both the formal methods of dispute resolution (litigation and arbitration) and three types of ADR: mediation, conciliation and adjudication. (Highlighted in bold print) A different pattern of perceived suitability for Dispute Review Boards and Executive Tribunals is observed.

1.4.3.1 Perceived suitability of conciliation, mediation and adjudication for resolving different financial sizes of disputes.

The observed means and confidence intervals (CI) for the perceived suitability of conciliation, mediation and adjudication for financial disputes less than £50,000 are 1.82 (SE 0.10) (95 % CI: 1.55 - 1.95), 1.96 (SE 0.11) (95 % CI: 1.73 - 2.19) and 2.01 (SE 0.12) (95 % CI: 1.70 - 2.20) respectively. The CI interval for these ADR procedures suggests highly significant levels of perceived suitability for resolving disputes of this financial size. The respondents perceive that these three ADR procedures are eminently suitable for the resolution of disputes under £50,000.

A pattern then evolves for these three ADR procedures. They are grouped together and continue to be perceived as significantly suitable, but in declining levels of suitability until the "dispute size" reaches £1 million. Thus, for disputes at the £50,000-£250,000, the observed means are: mediation 2.14 (SE 0.10) (95 % CI: 1.94 - 2.37), conciliation 2.18 (SE 0.10) (95 % CI: 1.95 - 2.37) and adjudication 2.21 (SE 0.10) (95 % CI: 2.00 - 2.44). Again, the 95 % confidence intervals indicate that the respondents regard these three ADR procedures as significantly suitable for the resolution of disputes of this financial size.

At the £250,000-£1million level, they are still regarded as significantly suitable, but, again, less so than at the previous dispute size. The observed means for disputes between £250,000-£1million are: mediation 2.65 (SE 0.10) (96% CI: 2.45- 2.86), adjudication 2.72 (SE 0.11) (95 % CI: 2.52 - 3.00) and conciliation 2.76 (SE 0.10) (95 % CI: 2.54 - 2.98).

This pattern for the three ADR procedures continues, but as the financial size of dispute rises beyond £1 million, they are perceived as being significantly unsuitable. Thus, for disputes at £1million-£5million, the observed means are: conciliation 3.36 (SE 0.11) (95 % CI: 3.14 - 3.60), adjudication 3.37 (SE 0.11) (95 % CI: 3.16- 3.64) and mediation 3.38 (SE 0.11) (95 % CI: 3.17- 3.60). When the observed means for the highest level of financial dispute, over £5 million, are examined, significant levels of unsuitability are recorded. The observed means for disputes over £5 million are: adjudication 3.65 (SE 0.13) (95 % CI: 3.38 - 3.93) , mediation 3.68 (SE 0.12) (95 % CI: < 3.43- 3.93) and

conciliation 3.79 (SE 0.12) (95 % CI: 3.55- 4.04).

This pattern for mediation, conciliation and adjudication reveals that, as the financial size of the dispute increases, the levels of perceived suitability of these ADR procedures declines. All three are highly suitable for smaller disputes, but, once the level of £1million is reached, all three are perceived as being unsuitable. When the observed means for the formal systems for financially small disputes, (under £250,000) are compared to those for mediation, conciliation and adjudication, these three ADR procedures are perceived to be significantly more suitable than either of the formal systems of dispute resolution.

1.4.3.2 Perceived suitability of litigation and arbitration to resolve different financial sizes of dispute.

A reverse pattern is observed for the formal procedures of arbitration and litigation. When the levels of suitability for litigation and arbitration are scrutinised, it shows that the formal systems are perceived to be significantly suitable for disputes over £5 million and this suitability decreases as the size of the dispute gets smaller. The observed means for litigation at this level is 2.04 (SE 0.12) (95 % CI: 1.84 - 2.35) and for arbitration it is 2.32 (SE 0.11) (95 % CI: 2.11 - 2.60). The CI intervals indicate significant levels of perceived suitability. It is noted that litigation is perceived as more suitable for resolving disputes over £5 million than arbitration. At the £1-5 million financial level of disputes, the observed means are similar: For litigation it is 2.35 (SE 0.11) (95 % CI: 2.13 - 2.61) and for arbitration it is 2.32 (SE 0.11) (95 % CI: 2.18 - 2.66), which, again, indicates a significant level of suitability for both these procedures at this size of dispute.

At the two smallest financial sizes of dispute, both litigation and arbitration are perceived as unsuitable to a significant degree. Litigation comes bottom of the table for both these two financial categories. Its observed mean for disputes under £50,000 is 4.29 (SE 0.10) (95 % CI: 4.04 - 4.50) and for disputes between £50,000-£250,000, the observed mean is 3.80 (SE 0.10) (95 % CI: 3.62- 4.05), which indicates that the respondents perceive that litigation is extremely unsuitable for the resolution of disputes at both financial levels.

Arbitration fares a little better than litigation in its observed levels of suitability, but the pattern of declining suitability as the dispute size decreases remains. The observed mean for disputes under £50,000 is 3.59 (SE 0.13) (95 % CI: 3.23 - 3.81), which suggests that arbitration is perceived as significantly unsuitable at this level. In contrast to litigation, it is noted that arbitration is perceived to be suitable to a significant degree for dispute at the £250,000-£1million level, where the observed mean is 2.63 (SE 0.10) (95 % CI: 2.49 - 2.85). In contrast to litigation, disputes at the £50,000 - £250,000 level have an observed mean of 3.13 (SE 0.11) (95 % CI: 2.85 - 3.33), which indicates that arbitration is perceived as being suitable for the resolution of disputes at this level.

Although litigation and arbitration show a similar pattern of declining suitability as the financial size of the dispute decreases, arbitration is perceived as more suitable in the middle sizes of dispute. For the very large financial disputes, litigation is perceived as a clear leader. The findings suggest that, regardless of sub-group of "contractor type" and "turnover size", litigation is more likely to be chosen in the largest financial sizes of dispute in preference to any ADR procedure. The same applies to the choice between arbitration and ADR for the larger sizes of dispute.

1.4.3.3 Perceived suitability of the DRB and the Executive tribunal to resolve disputes at different financial levels.

The other ADR procedures which are analysed in this grid are the DRB and the Executive Tribunal. Another pattern emerges for these two procedures. The reported confidence intervals demonstrate that the respondents do not perceive either procedure to be significantly suitable for resolving disputes at any financial level.

Both the Executive Tribunal and the DRB are perceived as unsuitable to a significant degree at the two largest sizes. For disputes over £5 million, the observed mean for the Executive Tribunal is 3.54 (SE 0.13) (95 % CI: 3.27 - 3.80) and for the DRB it is 3.60 (SE 0.13) (95 % CI: 3.36 - 3.87). At the £1-5 million financial level, the observed mean for the Executive Tribunal is 3.32 (SE 12) (95 % CI: 3.05 - 3.53) and for the DRB is 3.50 (SE 0.12) (95 % CI: 3.25 - 3.71). Thus it is likely that neither of these two dispute procedures will be chosen before litigation or arbitration at these financial levels of

disputes.

When the observed means for the level of suitability for all five ADR procedures are compared for the three smallest sizes of dispute, conciliation, mediation and adjudication record significant levels of suitability, whereas the Executive Tribunal and the DRB are perceived to be merely suitable. (See figure 66) It is likely that this perception will affect contractors' choice of type of ADR procedure as the Executive Tribunal and the DRB are less likely to be chosen in preference to the other three ADR procedures at these financial levels of disputes.

Figure 66: Observed means for ADR procedures at the three lowest financial levels of dispute.

	£250,000- £1 million	£50,000- £250,000	Under £50,000
DRB	3.09	3.06	3.06
Executive Tribunal	2.93	2.89	2.88
conciliation	2.76	2.18	1.82
mediation	2.65	2.14	1.96
adjudication	2.72	2.21	2.01

Cross tabulation of observed means for the level of suitability of ADR procedures at the three lowest financial sizes of dispute tested.

1.4.4 Summary

The results of the findings of the dispute resolution procedure grid support the theory that an important factor in the choice of ADR procedure is the financial size of dispute. The cut off point appears to be for disputes over £1 million, where no ADR procedure is perceived to be significantly suitable. Thus, for disputes over £1 million in financial size, the formal systems of dispute resolution are likely to continue to be favoured. Where the financial size of dispute is relatively small, three ADR procedures stand out as being significantly suitable: mediation, conciliation and adjudication. Hence, for disputes under £1 million in financial size, the ADR procedures of mediation, conciliation and adjudication are likely to be perceived as more suitable and thus chosen in preference to

either the DRB or the Executive Tribunal.

The DRB and Executive Tribunal are perceived as suitable for the large to middle range disputes, but not as significantly suitable. The formal systems of arbitration and litigation are perceived to be significantly suitable for these larger sizes of disputes. Therefore, in disputes over £1 million in size the formal systems are likely to continue to be chosen before the DRB or the Executive Tribunal, because contractors perceived litigation and arbitration to be significantly suitable for these sizes of disputes.

The findings support the evidence of the indicator interviews and the literature that there is a perception that ADR is more suitable for the smaller sizes of disputes. It is likely that dispute size is one factor which is involved in the choice of dispute resolution procedure. ADR has not been frequently used¹⁷ and it was suggested in the previous chapter that negative perceptions are hindering the development and use of ADR.¹⁸ It is also probable that perceptions of the suitability of different dispute resolution procedures to the financial size of disputes are an important factor in choice of procedure and will become more important if the negative perceptions of ADR can be, or are, altered.

The follow-up interviews support the statistical findings of the survey that the larger the dispute the more likely the formal systems will be preferred. As one main contractor stated:

"Where size is concerned, it depends on the scale of money and scale of contract. Where there are very large amounts, it is unlikely they will want to settle over a table"

This view was confirmed in an interview with a specialist contractor:

"I have no personal experience of using ADR, but it would seem to me that the bigger the problem, and, generally speaking this means in financial terms, the more likely there is

¹⁷ Chapter 4 section 3 para. 3.2

¹⁸ Chapter 5 para. 1.6

going to be a requirement for the resolution procedure, whatever it be, to be done on a formal and binding nature. I think it would only be where, relatively speaking, the numbers were small, where the parties will agree to any other form of procedure."

1.5 Interaction between "contractor type" by "turnover size" by "procedure type" by "dispute size".

It was reported above¹⁹ that the MANOVA repeated measures test statistic indicates that there is trend at the 0.10 level of significance for an interaction between "contractor type" by "turnover size" by "dispute size" by "procedure type". The observed means for the suitability of "procedure type" and "dispute size" for each sub-group show, that all the sub-groups follow the described patterns fairly closely, except for sub/specialist contractors from the largest turnover category.²⁰ Figure 67 gives the observed means of the perceived level of suitability for each procedure at each financial size of dispute for this sub-group. The interpretation for the interaction is treated with caution, because the total number of respondents in this sub-group is 6. Therefore, it is only reported in order to explain the test statistic and to point to a possible future trend.

¹⁹ Chapter 6 para. 1.4.2

²⁰ See appendix 5

Figure 67: Table of observed means for sub/specialist contractors in the turnover category of £50million+ by "dispute size" by "procedure type".

	Mean	SE mean	Total in sub-group
Mediation £50,000	1.33	0.33	6
Mediation £50,000-£250,000	1.50	0.34	6
Mediation £250,000-£1million	2.17	0.48	6
Adjudication £50,000-	2.33	0.84	6
Conciliation £1-5million	2.33	0.42	6
Conciliation £5million+	2.50	0.50	6
Conciliation £50,000-£250,000	2.50	0.72	6
Conciliation £250,000-£1million	2.67	0.56	6
Conciliation £50,000-	2.67	0.80	6
Litigation £1-5million	2.71	0.68	7
Litigation £5million+	2.83	0.75	6
Adjudication £50,000-£250,000	3.00	0.73	6
Litigation £50,000-£250,000	3.00	0.68	6
Arbitration £250,000-£1million	3.17	0.60	6
Arbitration £5million+	3.17	0.83	6
Arbitration £1-5Million	3.17	0.83	6
Litigation £250,000- £1million	3.33	0.61	6
Litigation £50,000-	3.33	0.80	6
Mediation £5million+	3.33	0.61	6
Mediation £1-5million	3.33	0.61	6
Adjudication £250,000-£1million	3.33	0.61	6
Executive Tribunal £50,000-£250,000	3.50	0.81	6
Executive Tribunal £50,000-	3.50	0.81	6
Arbitration £50,000-£250,000	3.67	0.67	6
Dispute Review Board £5million+	3.67	0.67	6
Dispute Review Board £50,000-£250,000	3.67	0.67	6
Dispute Review Board £50,000-	3.67	0.67	6
Dispute Review Board £250,000-£1million	3.83	0.54	6
Executive Tribunal £5million	3.83	0.54	6
Executive Tribunal £250,000-£1million	3.83	0.60	6
Dispute Review Board £1-5million	4.00	0.45	6
Executive Tribunal £1-5million	4.00	0.45	6
Adjudication £1-5 million	4.17	0.40	6
Arbitration £50,000-	4.33	0.67	6
Adjudication £5million+	4.50	0.34	6

Table of observed means and confidence intervals for the perceived levels of suitability given by sub/specialist contractors with a turnover of £50 million and over for different types of dispute procedure at different financial levels of dispute.

The observed means shown above in figure 67 reveal that the patterns for the total sample, which are interpreted above, do not hold true for the sub-group of sub/specialists with a turnover of £50 million and over. Most notable are the observed means for conciliation, for which high levels of suitability for all five financial sizes of dispute are recorded. (Highlighted in bold print.) This is markedly different from the observed

means for conciliation reported for the total sample, particularly at the larger financial sizes of disputes. (See figure 65) (The observed mean for levels of suitability for disputes over £5 million is 3.79 and for disputes between £1-5 million it is 3.36, which indicates that the total sample perceive conciliation to be significantly unsuitable at these financial sizes.) This interpretation explains the interaction between "dispute size" by "procedure type" by "contractor type" by "turnover size", which the MANOVA repeated measures test statistic indicates, but, as it is at the 0.10 significant level and there are small numbers of subjects in the sub-group, this is treated with caution.

1.6 Summary of findings for MANOVA repeated measure test.

The MANOVA repeated measures test gives a significant test statistic at the 0.05 level for the effect of "procedure type" by "dispute size". The test further reveals that there is no significant effect of "contractor type" or "turnover size". (There is an interaction between all four effects at the 0.10 level, which is summarised below.) The respondents to the survey perceive that some dispute resolution procedures are more suitable to resolve disputes at different financial sizes and this perception is held by both main contractors and sub/specialist and all turnover categories.

An analysis of the observed means of the levels of suitability shows that three ADR procedures, mediation, conciliation and adjudication are perceived to be significantly suitable for small sizes of financial dispute and that, as the dispute size increases, the suitability of these procedures decreases. For disputes over £1 million, these procedures are perceived to be significantly unsuitable.

The converse is found to be true for the formal procedures of arbitration and litigation, which are found to be significantly suitable for large financial sizes of disputes and this suitability declines as the dispute size decreases. Arbitration is perceived to be more suitable for the middle sizes of dispute than litigation.

The ADR procedures of the DRB and Executive Tribunal display a different pattern from either the formal systems or the other ADR procedures. The DRB and the Executive Tribunal are perceived to be suitable for the larger sizes of dispute, but not for the smaller

sizes, where they are found to be significantly unsuitable. In these large disputes, the formal systems are perceived to be significantly more suitable and therefore, it is likely that litigation and arbitration will be chosen in preference to either the DRB or the Executive Tribunal at these levels of dispute.

Many of the interviewees in the follow-up interviews did not believe that ADR is limited in its application to small sizes of construction dispute and this is particularly so for those who had actually used ADR.

"We proposed ADR for sums of over five million but, again, it is a question of confidence. If you think you are right, believe you are right, you don't mind if it is twenty million. The person on the other side may say, ' Heaven's above, this is like a quick game of cards or throw of the dice. I might be right. I might be wrong. Do I really want to know this quickly?' So I suppose there is a tendency for people to resist ADR on large sums, but I don't think it is justified, but there we are."

However, when interviewees in the follow-up interviews were questioned more closely on the factor of size, it was admitted that there would be a general reluctance to use ADR for large disputes. Several reasons were given to explain this attitude. ADR is relatively untested and the interviewees felt that they would be reluctant to test ADR with a large dispute. As one main contractor explained;

"Well, people who did not quite fancy the idea would say, 'Yes, I would try it, if it appears suitable, but I would really like to see somebody else try it before we do.' Then try to see the track record and certainly try it on something smaller."

Another problem with experimenting with ADR is, if it either goes against the party or the possible settlement is not satisfactory, they are forced to go on with the formal systems and the costs mount up. For many contractors, an easier solution is to use the formal systems, because if the judgment goes against them, the blame is not attached to them personally.

"Believe or believe it not, I think a lot of people are frightened to make decisions. The whole of British industry is littered with people, probably in fairly senior positions, who hate making decisions. They think that if the sum is so huge, 'What happens if the ADR goes against you and you have then got to make a commercial decision as to whether you accept that ADR or alternatively play on?' Now that is a decision which many executives would not probably want to make. It could have substantial impact on your business and the big problem for them is that the process may be wrong. At least if they go to arbitration and they fight the whole thing out, then at the end of the day, obviously because there are limited rights of appeal on arbitration, that decision is, if you like, final."

The follow-up interviews support the findings of the survey that financial size of dispute is an important factor in the choice of dispute resolution procedure. Until ADR is seen to have a proven track record, it is unlikely that it will be used for large disputes and the formal procedures are likely to continue to be chosen in preference to it. ADR is most likely to be tested on smaller sizes of disputes before contractors in general will be prepared to use it for larger sizes.

1.7 Experience of contractors who have used ADR with the financial size of disputes and using ADR.

The experience of contractors who have used ADR confirms that ADR is being used for disputes which are small (under £1million) in financial size. Although ADR has been used by only 9 of the respondents to the postal survey, these contractors have used different ADR procedures on 21 occasions. Figure 68 below provides a breakdown of the number of times that the various ADR procedures have been used at the five different sizes of financial disputes. The respondents were asked to state whether the dispute settled, partially settled or did not settle.

Figure 68: Number of times different ADR procedure have been used and whether the dispute settled, did not settle or partially settled.

	£5m +	£1m +	£250,000 +	£50,000 +	£50,000-	Total used	Settled	N o t settled	Partially settled
Mediation	2	1		1	1	5	2	2	1
Executive Tribunal	1					1		1	
Adjudication			1	5	7	13	9	2	2
Conciliation			1			1		1	
DRB									
E x p e r t determination					1	1	1		
Total used	3	1	2	6	9	21	12	6	3
Settled	1	1		2	8	12			
Not settled	2		1	3		6			
Partially settled			1	1	1	3			

Cross-tabulation of number of respondents using ADR at different financial levels and whether the dispute settled, did not settle or partially settled, at each different financial level.

ADR has been used 21 times by the respondents and on 17 occasions the dispute was under £1 million. Of the 12 occasions that ADR successfully settled the disputes, 10 of these disputes were under £1 million in size. Adjudication has been used 13 times by the respondents to the survey, which is more often than any other ADR procedure. On all 13 occasions, the disputes were under £1 million in financial size. The results supports the survey conclusions that ADR will, most likely, be used for disputes with a financial size of under £1 million and the formal procedures will continue to be chosen for disputes over this financial size.

2 APPROPRIATENESS OF ADR TO RESOLVE ALL CONSTRUCTION DISPUTES

One objective of the postal survey was to identify the factors which may influence the

choice of ADR as a dispute resolution process. The potential influence of the negative perceptions and the financial size of disputes have been discussed above. It is proposed that, if contractors in the construction industry do not regard ADR as appropriate for some types of construction disputes, they will not choose it to resolve those disputes. In order to discover if there are other factors which are influencing the choice of ADR, the respondents to the survey were asked: **Do you consider ADR an appropriate method for the resolution of all types of construction dispute? yes, no, or don't know.**

Figure 69: Do you consider ADR an appropriate method for the resolution of all types of construction dispute?

	Yes	No	Don't know	Total
Frequency	44	66	88	198
Percentage	22.2%	33.3%	44.4%	100%

Cross tabulation of frequency and percentage for the total samples response to the question: Do you consider ADR an appropriate method for the resolution of all types of construction dispute?

Only 22.2% of the total sample think that ADR is appropriate for all types of construction dispute and 44.4% of those who answered the question did not know. (Figure 69) The results of this question suggest that there is a lack of knowledge about ADR and how appropriate it may be for the resolution of construction disputes. A third of all the respondents who answered this question did so negatively. (33.3%) The respondents were asked to give reasons for their views as to the appropriateness of ADR to resolve disputes. These comments are reviewed after the analysis of the differences between groups.

2.1 Analysis of differences between groups.

A log linear analysis (partial chi-square)²¹ was used to assess whether there was any difference in response to the question: **Do you consider ADR to be an appropriate method for the resolution of all construction dispute?** The log linear analysis tested for differences between (i) "contractor type". (ii) "turnover size" (iii) association of

²¹ Chapter 3 para. 7.5.2

"contractor type" by "turnover size". The test did not yield a significant result for any effect. The result of the hierarchical log linear test of partial association for the effect of "contractor type" is (partial chi-square = 1.20; df = 2; $p > 0.05$), which indicates that there is no significant effect of "contractor type" on the question. The result of the hierarchical log linear test of partial association for the effect of "turnover size" size is (partial chi-square = 3.8; df = 4; $p > 0.05$), which indicates that there is no significant effect of "turnover size" on the question. The result of the hierarchical log linear test of partial association on the "contractor type" by "turnover size" size is (partial chi-square = 3.47; df = 4; $p > 0.05$), which indicates that there no statistically significant association of "contractor type" by "turnover size" to the question.

None of the effects tested for are significant, therefore, the results for the total sample can be treated as the same for all the groups.

2.2 Contractor perceptions about the appropriateness of ADR to resolve construction disputes.

An analysis of figure 69 suggests that the sample do not believe that ADR is appropriate for the resolution of all types of disputes and this holds true regardless of "contractor type" or "turnover size". Therefore, contractors hold perceptions about the appropriateness of ADR to resolve construction disputes and it is likely that these perceptions are preventing the development and use of ADR. Chapter 5 has suggested that one factor preventing the choice of ADR is that it is perceived as being non-binding and that this may create delay in settlement. This chapter has considered that certain procedures of ADR are not deemed to be appropriate, depending on the financial size of the dispute. A further objective of the survey was to try to ascertain if there are other factors or types of disputes for which the respondents believe that ADR is inappropriate. These perceptions are likely to be instrumental in the choice of ADR. The respondents were asked to give reasons for their decision on the question: **Do you consider ADR to be an appropriate method for the resolution of all types of construction dispute?** These explanations were then analysed. 59.8% (119) of the respondents to the survey made *comments in this section*. In the follow-up interviews, the interviewees were asked to specify any factors which they believe make ADR inappropriate for the resolution of

construction disputes.

When the comments and interviews are analysed, they reveal that many respondents felt unable to answer this question, due to lack of experience and knowledge about ADR generally. Nearly one third (31.9%) of the respondents who completed this section made this observation.

When the responses were analysed, no single factor is identified as making ADR appropriate. (The comments on why the respondents would consider using ADR reveal that costs and time are the major influential factors.)²² Neither did any single factor stand out as clearly leading to the inappropriateness of ADR to resolve construction disputes.

Several factors are identified as, potentially, making ADR unsuitable for some construction disputes. They are described, as they illustrate areas where the suitability of ADR may be questioned by some contractors. They do not constitute a conclusive list, but they were the most frequently commented on by the respondents. The perception of the inappropriateness of ADR centres around the issue of the parties being polarised in their argument.²³ When this happens, the respondents to the survey are of the opinion that the formal systems are more suitable to force a resolution. Several respondents expressed the view that ADR may not be suitable when parties are entrenched in their position or not willing to compromise. As one main contractor stated in the survey:

"In many entrenched disputes, it would just add another layer to the types of settlement methods available, with very little beneficial outcome."

In the follow-up interviews, one main contractor contended that there is a short period in the life of a dispute, where ADR can be useful, but if this is missed and the parties become polarised in their arguments, a third party is needed to resolve the dispute:

²² Chapter 4 section 3 para. 3-3.3

²³ Some writers and interviewees use the word "entrenched". This is one perception which was tested in the attitude statements about ADR. Chapter 4 section 1 para. 1.2.3.2

"If you can catch it before people get entrenched and they haven't written dozens of letters to each other and put together huge quantities of evidence, you have got a chance. (To use ADR) It is far more difficult (to use ADR) because people have spent a lot of time getting the evidence together and the more you do it the more you believe in your own case. If you look at any argument, the more you look at it the more you can see the merits of it. You get more angry with the other side. The longer you look at your case then it gets more difficult. In which case someone else has to adjudicate."

There is support for the view that some disputes require the force of the formal systems, as they *"require stronger action than ADR."* One sub/specialist contractor commented:

"Some disputes are so intractable and long established that the due processes of the law are the only procedures that can effect a result enforceable on both parties."

The formal systems are perceived to be more appropriate in some situations, because they force the parties to assess their disputes and be realistic:

"I think there is a place for litigation and arbitration which makes all parties concentrate their minds on the reality of their case."

The formal systems are also perceived as being more appropriate when the dispute is legally complex and requires a legal precedent. Thus one sub/specialist commented that ADR is not appropriate:

"...when the dispute becomes a complex matter of legal argument based on points of law."

Other respondents felt that ADR is not suitable for very complex, technical disputes and there is a perception that this problem is exacerbated by the non-binding nature of ADR:

"Our gut reaction as to whether ADR would be suitable for all types of dispute is that, if faced with an extremely costly, complicated technical dispute, the thought of going

through a non-binding ADR and then having to start again with either arbitration or legal action would seem to suggest that in the first instance the use of ADR, at least in our case, should be limited to small disputes in financial value and less complicated disputes."

The ability of ADR to resolve complex technical issues was doubted by one main contractor in the follow-up interviews:

"A huge amount of technical argument depends on the category of the person involved. If there was a huge amount of technical evidence, if you had to look at a whole host of what might be described as nitty-gritty technical issues, I wonder whether it (ADR) would be appropriate for that."

One main contractor explained that, where there are technical or legal issues, these have to be settled by someone who has the particular knowledge in those fields. If an ADR process was to be used, each side would use experts and one person would have to try to sort it out:

"Well, you would end up with full arbitration then, wouldn't you? With both sides being experts, you end up with one person trying to sort out what the experts are saying and you might as well have had the arbitration."

To summarise, ADR is perceived to be inappropriate where the parties to the dispute have become entrenched in their positions. In these situations, the formal systems are perceived by both types of contractor to be better at resolving the dispute. Further, some main and sub/specialist contractors believe that for disputes which require a legal precedent, or are legally complex, the formal systems must be used. Finally, some respondents doubt the ability of ADR to tackle complex, technical disputes where experts are required.

The final area where there were comments about the inappropriateness of ADR to resolve disputes is where there is a need for a binding decision or where the parties are merely trying to delay the settlement. The effect of the negative perceptions has been discussed

already.²⁴

3 ADJUDICATION

3.1 Adjudication is the most suitable ADR procedure.

Adjudication has been referred to in the literature and the interviews as a suitable ADR procedure for the construction industry. The final outcome of the Latham Report is the implementation of adjudication as a statutory right under the Housing Grants, Construction and Regeneration Act 1996.²⁵ One objective of the survey was to test the respondents' perception of the appropriateness of adjudication to the construction industry. In the item pool of attitudes which were tested, the respondents were asked to assess their level of agreement with the statement: **Adjudication is the most suitable ADR procedure for the construction industry.**

Figure 70: Adjudication is the most suitable ADR procedure for the construction industry.

	strongly agree	agree	neutral	disagree	strongly disagree	Column total
Frequency	2	58	110	27	3	200
%	1%	29%	55%	13.5%	1.4%	100%

Cross tabulation for the total sample response for the statement: Adjudication is the most suitable ADR procedure for the construction industry.

Figure 70 shows that 55% of the sample are neutral to the statement that ADR is the most suitable procedure for the construction industry. The observed mean is 2.86 (SE 0.05) (95% CI: 2.75 - 2.96), which suggests a significant level of agreement with the statement. It is noted that the higher end of the confidence interval is bordering on 3, which is not a high level of significance. However, the suitability of adjudication is supported by the findings of the survey for respondents who have used ADR.²⁶ Adjudication has been used

²⁴ Chapter 5

²⁵ Latham Report (1994) op cit See chapter 2 para. 4.3

²⁶ Chapter 6 para. 1.7

13 times (out of a total of 21 occasions) by the respondents to the survey, which is more often than any other ADR procedure. (See Figure 68)

3.2 Differences between groups.

The MANOVA procedure was run on the item pool statements in order to assess any differences of three effects:

- (i) effect of "contractor type"
- (ii) effect of "turnover size"
- (iii) interaction between "contractor type" by "turnover size"

The MANOVA test statistic for the effect of "contractor type" on the item pool indicates that there is no significant effect²⁷ and the individual test statistic for this statement is also not significant.²⁸ There is a significant effect of "turnover size"²⁹ on the item pool but the individual test statistic for this statement did not yield a significant result.³⁰

- (iii) Interaction between "contractor type" by "turnover size".

The MANOVA test statistic for the interaction between "contractor type" by "turnover size" does not indicate that there is any interaction on the item pool of statements. However, the individual test statistic for the statement **Adjudication is the most suitable ADR procedure for the construction industry**, is ($F = 2.40$; $df = 2/159$; $p = 0.094$), which is reported, as it indicates a trend at the 0.10 level. In order to interpret where the interaction is, a multiway cross-tabulation was calculated.

²⁷ Chapter 4 para. 2.2.2

²⁸ ($F = 0.23$; $df = 1/159$; $p > 0.05$), which is not significant at the 0.05 level.

²⁹ Chapter 4 section 2 para. 2.2.3

³⁰ ($F = 0.20$; $df = 2/159$; $p = > 0.05$), which is not significant at the 0.05 level.

Figure 71: Multiway cross tabulation: Adjudication is the most suitable ADR procedure for the construction industry by "contractor type" by "turnover size".

Turnover category	Main/subcontractor		Group total mean
	main	sub	
	mean	mean	
£6 million and under	2.69	2.81	2.76
Under £50 million	2.71	3.00	2.84
£50 million and over	3.11	2.60	3.00
Group total	2.85	2.85	2.85

Multiway table of observed means for "contractor type" by "turnover size" for the statement: ADR is the most suitable procedure for the construction industry.

When figure 71 is interpreted to assess the interaction between "contractor type" by "turnover size", it is noted, that, as the "turnover size" of main contractors increases, the perception about the suitability of adjudication changes. Main contractors in the smallest turnover category have a high level of agreement with the statement that adjudication is the most suitable type of ADR procedure for the construction industry, the observed mean for this sub-group is 2.69 (SE 0.10). By comparison, main contractors in the largest turnover category disagree with the statement. The observed mean for this sub-group is 3.11 (SE 0.12). Main contractors in different turnover groups hold different opinions about the statement that adjudication is the most suitable ADR procedure for the construction industry. Further, the observed mean for sub/specialists in the largest turnover group is 2.60, which is a very high level of agreement with the statement that adjudication is the most suitable dispute resolution procedure for the construction industry. In contrast, main contractors in the largest turnover group are in disagreement.

Although the MANOVA test statistic is reported as a trend, there is a notable difference in opinion about the suitability of adjudication, depending on "contractor type" by "turnover size". The trend for this interaction is that main contractors in the largest turnover category are less likely to perceive adjudication as the most suitable type of dispute

procedure for the construction industry, whereas all the other groups agree or are neutral about the statement. Main contractors with a turnover of over £50 million are less likely to favour adjudication.

The indicator interviews and the follow-up interviews support this finding that some groups favour adjudication. One sub/specialist contractor who was interviewed, believed that the attraction of adjudication is that the main contractors are unlikely to pursue a dispute to arbitration if the adjudicator has already decided against them:

"It is all really to do with the bad main contractor taking liberties with the sub-contractor's money and in that limited sense, if a main contractor is frivolously withholding money for the sake of easing his cash-flow, then the adjudication process and the adjudicator himself will put a stop to that....It is extremely unlikely that a main contractor, if he's had his knuckles wrapped from the point of view of wrongfully withholding money from a sub-contractor, he is not going to try and turn to arbitration."

Follow-up interviews with large main contractors support the finding that some main contractors are not enthusiastic about using adjudication for disputes with sub/specialist contractors:

"What often happens, and again this goes sometimes to the quality of the adjudicator...is an adjudicator has been appointed and he finds himself incapable of virtually making a decision, consequently, occasionally, we are required to put all the money on joint deposit... and then at the end of the day, when the matter is resolved, we can't get the sub-contractor to release the money. So, eventually, we have to threaten applications and it becomes painful. Again, the adjudication process and quality of adjudicators is the problem."

These interviews took place before adjudication had been enacted as a statutory right under the Housing Grants, Construction and Regeneration Act 1996.³¹ The results of the

³¹ Chapter 2 para. 4.3

survey suggest that some groups are more likely to favour adjudication than other groups and this is likely to affect the choice of adjudication by those groups, when it is implemented as a statutory right.

4 Analysis of the factors which influence choice of ADR.

This chapter has considered the possible factors, other than the negative perceptions about ADR, which are influencing the choice of ADR for dispute resolution. One factor which may influence this choice is the perception that ADR is more suitable for small financial disputes. This perception was tested in two ways. First, attitudinal statements about the respondents perceptions of the suitability of ADR to dispute sizes were tested. Second, a question grid, which measured the respondents' perception of the level of suitability of different dispute procedures to different financial sizes of disputes, was analysed.

It is concluded from the attitudinal questions that the total sample perceive that ADR is suitable for all sizes of disputes and disagree that it is suitable for disputes under £100,000 only. However, statistical tests indicate that type of contractor and size of turnover group will affect these perceptions. The respondents do not agree, generally, that ADR is suitable for disputes under £100,000 only but there is a trend for sub/specialist contractors with a turnover of £50 million and over and main contractors in the smallest turnover category to agree that view. (Main contractors in this category are only very slightly in agreement.) Thus it is unlikely that *contractors, except those in the defined groups*, would confine the use of ADR to disputes under £100,000.

It is concluded from the dispute resolution procedure grid that there is a significant effect of the perceived suitability of different dispute resolution procedures for different levels of financial disputes. The tests reveal that there is no difference in contractor type and turnover categories. Thus different types of dispute procedure are perceived to be more suitable for the resolution of different financial sizes of dispute and there are no differences in the perceptions of different groups. (The test had revealed that there is a trend at the 0.10 level for an interaction between "contractor type" by "turnover size" by "dispute size" by "procedure type", which is explained below.)

When the observed means for the suitability of each procedure at each financial level of dispute are analysed, it shows that three ADR procedures (mediation, conciliation and adjudication) are perceived by the respondents to be highly suitable for small sizes of disputes and that, as the financial size of dispute rises, the suitability of the ADR procedure declines. It is concluded that these ADR procedures are regarded as suitable for disputes up to £1 million but, in the financial levels above, they are perceived to be very unsuitable.

The converse of this pattern is found for the formal systems of arbitration and litigation, which are perceived by the respondents to be highly suitable for disputes over £1 million and their suitability declines as the dispute size decreases. Arbitration evidences a higher level of suitability than litigation for disputes in the middle financial ranges. It is likely that contractors will choose the formal systems before ADR at large financial levels of dispute.

The ADR procedures of the DRB and the Executive Tribunal display another pattern. They are perceived to be suitable for the large financial sizes of disputes, but unsuitable for the smaller disputes. Thus, as conciliation, mediation and adjudication are perceived to be significantly suitable, it is likely that they will be chosen before the DRB and the Executive Tribunal at the smaller levels of dispute. At the higher levels of financial dispute, arbitration or litigation are likely to be selected before either the Executive Tribunal or the DRB. The current perception, held by the both types of contractor, of these two ADR procedures are such as to make them less likely to be chosen to resolve disputes of any size.

Although the above patterns, generally, hold true for "contractor type" and "turnover group", it is concluded from the statistical tests that sub/specialists from the largest turnover category are more likely to favour conciliation. However, this sub-group is small in number and thus this result is treated with caution.

The survey sample do not believe that ADR is suitable for the resolution of all types of dispute. The reasons given for this response are a lack of experience and knowledge to

answer the question. When the survey comments and follow-up interviews are analysed, it is apparent that there is no single factor which makes construction disputes inappropriate for resolution by ADR. The main factors which are considered to make certain disputes less appropriate for ADR centre around the following issues; the entrenchment of the parties in their arguments, the appropriateness of the formal systems and the legal and technical complexity of a dispute.

The final section considered the perception of the respondents to the statement that **Adjudication is the most suitable ADR procedure for the construction industry**. It is concluded that there is a weak significant level of agreement with this statement. Inferential statistics indicate that, as the turnover category of main contractor increases, they are less in agreement with the statement. Main contractors in the largest turnover category disagree with the statement, which is a notable difference of perception from the other sub-groups who agree. The follow-up interviews confirm that there is indeed support for adjudication from some groups of contractors and the findings indicate that adjudication has been used, more often than any other ADR procedure, by the respondents to the postal survey *who have used ADR*.

This chapter has considered possible factors which are likely to influence the choice of ADR by contractors. The following chapter will examine the findings of the study made of legal advisors to the construction industry and the influence legal advisors may have in the development of ADR between main contractors and sub/specialist contractors.

CHAPTER 7

LEGAL ADVISORS

The aim of the thesis is to investigate the factors which impact on the development and choice of ADR by contractors as a dispute resolution procedure. This chapter examines the fourth hypothesis of the study; **Legal advisors in the construction industry are influencing the use of ADR.**¹

The aim of the legal advisor interviews (hereinafter called legal interviews) was to examine and explore the major issues that had been identified from the survey and follow-up interviews. This was achieved by using in-depth, focused interviews.² The legal interview agenda had several objectives:

- I. To explore the perceptions of legal advisors towards ADR.
- II. To discover the factors which influence legal advisors to recommend ADR.
- III. To examine how legal advisors perceive the use of ADR in the dispute resolution process.

This chapter takes the principal themes, which have been identified from the survey data and follow up interviews, and compares or contrasts the legal advisors perceptions and experiences of these issues. The necessary elements are as follows:

- 1 Resolving construction disputes without legal advisors.
2. Using ADR to resolve construction disputes.
Why contractors' say they would use ADR.

¹ Chapter 2 para.7 and chapter 3 para. 4.3.4

² Chapter 3 paras 9-9.5

- (i) The adversarial system.
- (ii) The perceived advantages of ADR.

3. Why contractors are not using ADR in great numbers.

- (i) The negative perceptions about ADR.
- (ii) The perception that ADR is not appropriate for some construction disputes.
- (iii) Legal advisors' experience of ADR.

4. The role of legal advisors in ADR.

- (i) Respondents perception of the role of legal advisors.
- (ii) Using legal advisors in ADR procedures.
- (iii) Legal advisors perception of their role in ADR.

1 RESOLVING CONSTRUCTION DISPUTES WITHOUT USING A LEGAL ADVISOR.

One hypothesis of the research is that legal advisors will be instrumental in the choice of ADR as a dispute resolution process. It has been suggested that people settle disputes with reference to their assessment of the probable outcome of going to court.³ Many people are unable to make this assessment without the assistance of legal advisors.

Therefore, their influence can be paramount in any decision about either action to be taken in settling the dispute or in the choice of dispute resolution procedure. In order to assess the input of legal advisors to the dispute resolution process, the respondents to the survey were asked: **Would you resolve construction disputes without seeking the advice of a legal advisor?** 73% of the respondents answered in the affirmative to this question.⁴ Statistical tests were performed in order to see if there are any differences between groups.

³ Fiss O. (1974) op cit Mnookin R. and Kornhauser L. (1979) op cit

⁴ Chapter 4 para. 1.2.2.3

1.1 Analysis of difference between groups.

A loglinear analysis of a multiway frequency table (partial chi-square)⁵ was used to assess whether there are any differences in response to the question: **Would you resolve a construction dispute without seeking the advice of a legal advisor?** for (i) "contractor type" (ii) "turnover size" and (iii) association of "contractor type" by "turnover size". When cross-tabulations were executed on the above variable for "contractor type" and "turnover size", some cells had a frequency of less than five (5). One restriction of using chi-square is that the number of items appearing in the "expected" category must be at least five and, as the hierarchical log linear module is based on a partial chi-square, the categories of "No" and "don't know" were collapsed. These two categories were collapsed because the main objective of the test is to analyse whether there are any differences between the groups who are saying that they would consider resolving a dispute without seeking advice from a legal advisor.

The results of the hierarchical log linear test do not indicate that there are any differences between groups in their response to this question. Therefore, there is a very high level of survey respondents who will consider resolving construction disputes without legal advice (73%) and this is so for all the different groups.

1.2 REASONS FOR RESOLVING DISPUTES WITHOUT A LEGAL ADVISOR.

1.2.1 Costs of legal advice and "know their own business".

The respondents to the survey were asked to give reasons for their decision to resolve dispute without the advice of a legal advisor. 72.1% of all the respondents made comments in this section. When the reasons were analysed, it is evident that the respondents are profoundly dissatisfied with the cost of legal advisors. This was the major factor cited by respondents.

The complaint about costs did not surprise many of the legal interviewees. Both claims

⁵ Chapter 3 para. 7.5.2

consultants were critical of solicitors or barristers who have, they claimed, a "vested interest" in the clients' dispute. This was countered by the barristers and solicitors who accused some claims consultant of "whipping up" their clients into believing they have a better claim than they do. Legal advisors reported that legal costs are increased because both litigation and arbitration are expensive methods of dispute resolution.

Legal advisors believe that clients are prepared to pay for legal services as they want the best advice. The costs are the "penalty" for having good, quick professional advice. The respondents to the survey and the follow up interviewees provide support for this contention, as there were numerous statements about using the 'best solicitor' or that they use 'London specialists'.

One provincial solicitor, who advises sub/specialist contractors predominantly, admitted that lawyers are expensive:⁶

"It is frightening how expensive they (solicitors) are and we are cheap. If you look at typical hourly charging rates for a commercial firm of solicitors in Bristol, and they are typical because I know that everybody else is much the same, partner rates are £135 per hour. Now that strikes me as being horribly expensive, but then you look at London and I know that the equivalent rate in London is £200-£250 per hourThen you start multiplying it by the number of hours involved, it just gets loopy, makes you sick. I know how that figure is made up and I know that if a client wants a solicitor who is stuck in an office building like this one and has lots of electronic gismos to communicate and wants the service which means that he gets a reply within a few minutes of telephoning, then if he wants all that, it is what it costs to provide it. But clients always do want all that..... The best service they can get and that is terribly expensive to provide."

1.2.2 Contractors perception of poor advice given by legal advisors.

Another perception held by the respondents is that they, "know their own business".

Many respondents attested to the fact that lawyers are not good at commercial decisions

⁶ Chapter 2 paras 3.1 and 3.21

and the advice that they receive is often unsatisfactory or has resulted in a poor outcome, in terms of the settlement achieved or the end decision in arbitration or litigation.

The criticism that legal advisors are not always good at their jobs was not denied by all the legal interviewees, who noted that in any profession, there are likely to be some "rotten apples" - people who are either not good at their job or who are only concerned with their own interests. A QC (Queen's Counsel) remarked that sometimes he has to spend time telling the client that the advice he has received has been wrong. Further, he stated that many barristers at the bar are incompetent:

"....on the other hand, there are a lot of prats at the Bar."

Interviewer: Can I quote you on that?

"You certainly can. I will be happy to name them as well. Indeed, amongst those, who hold themselves out as, how can I put it, as construction lawyers. There are two tendencies certainly amongst barristers: The one, I might call the academic tendency, who see everything in terms of very interesting points of law and all they are really interested is to collect the Law Reports. Then there are those who are rather more interested in serving their clients better."

1.2.3 Contractors perceptions of when legal advice is needed.

Despite the strong affirmation that contractors will consider resolving disputes without lawyers, when the reasons given are assessed, this decision is qualified for all respondents, whether they answered "Yes", "No" or "don't know" to the question. Seeking legal advice depends on the legal complexity of the dispute, the intransigence of the other party and the need to know the strengths and weakness of a case.⁷ The respondents and the follow up interviewees disclosed that legal advice is sought when the dispute involves a legal issue, such as the technical meanings of the terms of the contract. Further, the respondents to the survey intimated that legal advice is brought in if the

⁷ Chapter 4 para. 1.2.2.3

negotiations fail. At this stage of a dispute, the primary concern is to assess the strengths and weaknesses of one's case before going on to litigate or arbitrate. This was illustrated succinctly by the representative of a large main contractor:

"If I am going into battle, I want to know how strong my case is and want lawyers behind the scenes."

For many of the respondents and the follow-up interviewees, most disputes do not require legal advice, because they can be resolved with commercial negotiations or the will to compromise, but an unbiased view is needed because the parties to a dispute are, often, unable to appraise their arguments constructively. As stated by one sub/specialist contractor in the questionnaire:

"We are not (generally) good judges of the strengths of our own position! Also, we often allow people who have "lived with the problem" to commence the settlement proceedings. Their vision is likely to be clouded by the need to defend questionable earlier decisions, compounding the problem. Solution: good quality legal advice and a new unbiased settlement team."

Some respondents to the survey reported that they have access to in-house legal advice, which means that legal advice is not required until later in the history of a dispute. Nevertheless, it is confirmed by comments on the questionnaire and follow-up interviews that legal specialists are consulted at a later stage if the dispute has not been resolved in-house. When a dispute moves on to either of the formal systems, expert legal advice is used.

1.3 Legal Advisors' Response to Criticisms.

1.3.1 Provision of advice on strengths and weakness of case.

Legal interviewees support the contractors' perception that legal advisors are consulted frequently in order to assess the strengths or weakness of a case. Often having been given advice, the client does not return and, therefore, the assumption is that the dispute has settled without further action being required by the legal consultant. A provincial solicitor

who acts for sub/specialist contractors explained:

"Not involving lawyers depends on what each individual case requires. People come to lawyers because they want a view and they want a view from a solicitor on how it is likely to turn out if they have to use litigation or arbitration. They want to know what the law is saying, what is going to be achieved. A lot will come along to just get a view and then go away and do it and that is fine."

It is recognized by the legal advisors that most disputes are settled by the parties themselves and they are likely to become involved in only a few. A solicitor representing a leading construction law practice confirmed this view, but maintained that the importance is to define the meaning of dispute as ones which are *"make or break"*:

"If you take the average building contract, there are hundreds of disputes arise in building contracts and only a very few of them are of a significant nature or don't get resolved. So it could be more than 70% resolved without lawyers. When you get to the ones that are real make or break, I suppose those are the ones, if nothing else, you want a view as to what your position is and that's always going to be the case whether you mediate or not."

1.3.2 Parties locked into Standard Forms of Contract.

Legal interviewees argued that one reason that advice is sought is because of the system of contracts which are used in the construction industry. First, the parties often have little choice about the procedure to use as they are *"locked in"* to arbitration or litigation. The effect of this is that there is inevitably a reliance on the legal professions and legal advisors who have the necessary technical knowledge. Second, the nature of the contract is such that it requires the parties to prove particular points and claims. For both these situations, the legal advisors believe that their advice is essential, particularly when there is an evidential point which requires proof. Before clients can make a decision, either as to the dispute resolution process to use or the settlement to make, they need legal advice about how to prove these points. A solicitor who represents one of the leading construction law practices in the country explained the role of the legal advisor in these

situations:

"Any client wants to know the pros and cons of their particular case, both from a pure legal point of view or more importantly from a construction point of view, from the evidential point. What do you have to prove or what will you need to prove or how long will that take? Sometimes, you may have a very good theoretical case, but you can't prove the loss and the damage. I think to a great extent every client needs to know that before they decide on whatever mechanism of dispute resolution, even if it is to go back and have negotiations face to face."

1.3.3 Construction clients demand "hired gun".

Contrary to the claim that legal advisors are not commercial, many of the legal interviewees feel that they act on the instructions of their client and that, often, the client does not want to listen to the hard commercial facts of pursuing either arbitration or litigation. They want their day in court and want their legal advisor to champion their cause- to be their '*hired gun*'. If legal advisors try to counsel against litigation or arbitration, they are accused, it is claimed, of not having '*the bottle*'. The legal interviewees accept that some legal advisors are not good at commercial decisions and some have a tendency to make the problem too legalistic, but the majority maintain that an essential part of their job is to assist the client to resolve the dispute as expeditiously as possible and that this role is one of analysis, not fighting. A solicitor from a specialist provincial law firm described his perception of the solicitors role:

"My role is always to resolve a dispute. That is what my client pays me for. The legal process involved is adversarial, so I often resolve disputes by fighting them, but that is only part of my job. The real job is to get the thing resolved and that involves telling the client about his own weaknesses and his own realistic goals, which is not adversarial at all. It is an analysis role."

1.3.4 Contractors "know their own business".

Despite the assertion made by many respondents to the survey that they "*know their own business*," some of the legal interviewees were disparaging of the construction industry

and their clients. It was claimed that clients seek advice before they approach the other side to discover what the argument is about. Several legal advisors asserted that, on occasions, their clients were: either protecting dubious decisions from their senior management; were unconcerned about settling disputes or that they were concerned about endangering their image with their senior management. The legal interviewees suggested that many of those involved in the construction industry are not good at negotiating. On site, there is still a perception that the first to open negotiations in a dispute is in a weak position and this approach compromises good negotiation tactics.⁸

Another problem that the legal advisors perceived is that disputes are often due to the personalities involved. Parties to a dispute often become involved personally, which hinders its resolution. Frequently, one party is acting unreasonably. If senior management become involved, it often solves this problem, but where this is not possible the parties become entrenched and compromise becomes very difficult.

One QC who practices in the construction field finds his clients frequently have a poor grasp of the commercial reality of the formal system and this is true even when the client is a large organisation. The legal advisors perceive that one of their roles is to inject commercial reality about the resolution of the dispute using the formal systems:

"I think the experienced construction lawyers, both at the Bar and solicitors, are highly, often more, commercial than the client, because they have no emotional involvement. Time and time again, one is lowering one's client's expectations and saying, "Let's just have a look at the risk of war ratio. This is what your costs are going to be. These are the tactics the other side are going to adopt. That is what it means in terms of time, money and management time." That's another thing, of course, particularly acting for larger organisations; they have no conception of the commitments of management

⁸ Sommerville J. Reducing construction conflict: Engineering the Psycho-productive environment. ARCOM Ninth Annual Conference.(1993) Proposes the need to move construction conflict away from dispute resolution techniques towards management strategies which may incorporate the introduction of psychometric testing of an individual's attributes to improve the management team.

necessary in litigation, and one has to educate them."

1.4 Summary of when legal advice is sought.

Many respondents to the survey acknowledged that, when disputes are complex (either legally or technically), where negotiations have failed or where the parties have become entrenched in their arguments, usually legal advice is sought and settlement or resolution is made with reference to that advice. This perception is supported by the legal interviewees. The contention of this study is that, when the legal advisors are consulted about the strengths and weaknesses of a problem, these disputes may, potentially, be directed towards ADR. When legal advisors are consulted, their influence over the choice of ADR may be pivotal. It is, therefore, deemed to be vital to examine the perceptions the legal advisors have towards ADR, to assess what their recommendations are likely to be.

2 REASONS FOR USING ADR

Over 70% of the respondents to the postal survey maintain that in they would consider using ADR. The first hypothesis is that the development of ADR is due to dissatisfaction with the formal systems of dispute resolution. Chapter 4 examined the results of the survey and concluded that there is considerable dissatisfaction with the formal systems of dispute resolution and that this supports the first hypothesis. The major criticisms of the formal systems are that they use adversarial procedures and are costly and slow. In comparison, the contractors in the construction industry hold the perception that ADR has the desired qualities, which are lacking in litigation and arbitration, which is that it is cheap, quick and non-confrontational. The respondents are significantly in agreement with the statement that there is a need to move away from the adversarial approach. (Over 80%)⁹ The survey respondents and the follow-up interviewees attach considerable blame to the legal profession, which is perceived to be the main beneficiary of such an approach. There is a widely held perception in the construction industry that the legal profession is responsible for the adversarial approach.¹⁰

⁹ Chapter 4 section 1 para. 1.1.1

¹⁰ Chapter 2 para 3.2.1 and para. 3.2.2

2.1 Adversarial system.

2.1.1 Legal advisors perceptions of the problems with the adversarial approach.

The legal interviewees were asked to comment on the survey response that over 80% of the respondents perceive that there is a need to move away from the adversarial approach. Many of the legal advisors recognise that the attributes of arbitration and litigation are unpalatable to the construction industry. They confirm that the criticisms of the costs and time involved in the formal systems are justified. Further, they accept that the costs could be taken up by issues which frequently are not relevant. Although it is admitted that this could, sometimes, be caused by a poorly prepared advocate, blame is apportioned to the clients also, who may have given misleading information. A barrister explained the problems created by the adversarial approach:

"Well, there can be a great deal of time taken up with points which may not at the end of the day have a great deal to do with the case. Whether that is the fault of the advocate, because he has not prepared his case properly or whether it is because he is doing it on instructions or he has been misled in some way by his clients; it is always difficult to say, but that is certainly one process or part of the process which I can see fairly commonly. It swallows up a lot of time, without anything being achieved on the other side."

There is an acceptance by the legal interviewees that the adversarial system could be threatening for many people unversed in its procedures. The giving of evidence and cross-examinations are frightening and confusing experiences for some and the 'bullying tactics' adopted by some barristers are unnerving. One barrister described the process of giving evidence in a witness box:

"I think that the people who give evidence find that can be a particularly upsetting process. They come into the witness box with a very clear idea of what their account of events is and they find sometimes that they get confused or they get bullied by the other side's counsel, which is something that happens rarely but is extremely regrettable that it does happen.....going to court and all this involves can be a frightening process."

2.1.2 Legal advisors' perceptions of the advantages of the adversarial approach.

Notwithstanding an acceptance of some of the perceived problems that the adversarial system has, many of the legal advisors defend the adversarial system, as its primary function is to reveal the truth about the arguments which the parties put forward. There is a recognition that the adversarial approach may not be appropriate for all disputes, particularly where commercial settlements are required, but there is a general acknowledgment that both litigation and arbitration have their place when there is a need for a final, binding solution which has been tested for the truth: *"If you are trying to get a final resolution...without the adversarial approach, you are not going to get at that truth. You are not going to destroy the junk that has been piled up."* A leading QC considers that when large amounts are in dispute, the adversarial approach has the advantage of ascertaining the strengths and weaknesses of a case and the added bonus of vindicating the disputant in the right:

"If you are talking about the sort of big amounts and non-binding expert examination, it is really best to leave the parties to act as adversaries... if the adversarial approach is adopted, it can have the effect of a bloodletting. A right of passage does happen. The disputants feel that they have stood up for themselves and had it out."

2.1.3 Perception that construction clients are adversarial.

A notable perception held by all the legal interviewees, but one,¹¹ is that the clients are, themselves, adversarial. By the time the legal advisor is consulted, the parties are polarised into their positions and, as far as most of the clients are concerned, the legal advisor cannot be adversarial enough. For many of the legal interviewees, the claim that contractors in the construction industry want to move away from the adversarial approach,

¹¹ One claims consultant was of the opinion that the construction industry was not asking the lawyers to fight for them, clients want to find solutions to their problems and that a new method of negotiation was required which was not adversarial. However, much of his interview was contradictory. In order to aid their clients, the interviewee said that barristers were consulted at a very early stage. The interviewer was of the opinion that the interviewee may indeed have hoped that the construction industry was looking for a new method of negotiating, rather than having any real evidence that this was so.

is merely "lip service" to a theoretical idea which is prevalent in the media. When they are consulted, it is no longer at the fore-front of their clients minds. For some legal advisors, being adversarial is the role that they are trained for. A prominent QC at the construction bar stated that his function is to satisfy his client by giving the opposition a gruelling examination in court:

"Somebody walks in when he is owed money, steam coming out of his ears. Suddenly, you can't get too adversarial. I think the interesting thing is it is not the lawyers who are adversarial, it is the parties who are adversarial. This may be another reason why they like the aggressive lawyer, because it is catharsis for them. They can vent their venom at the other side. I mean, I have to confess that one plays to the gallery in cross-examination, because you know that you are giving enormous satisfaction to your client. One of the reasons your client is retaining you is because he wants you to give Joe Bloggs, who sat opposite him at a negotiating table two years before and raised two fingers at him, he wants you to give him a hard time and you are being paid to do that. I don't mind. It is perfectly ethical as long as it is in my client's best interests and I am not acting in any way which is contrary to the Code of Conduct laid down. I am happy to do it. It is part of my job. So to say, "let's be less adversarial" so far as lovely phrases can go but it is completely untrue in practice."

This perception, that it is the client that is adversarial, is shared by barrister, solicitors and claims consultants. A claims consultant described his perception of what the clients were looking for from him:

"I think most parties that come to us want us to put forward their best possible case. Punch the other chap on the nose."

2.1.4 Manipulation of the formal systems of dispute resolution.

The legal advisors confirm the perception held by the respondents to the survey that the formal systems are manipulated in order to prevent settlement and payment of claims. The legal advisors who represent the sub/specialist contractors impart a strongly held attitude that it often takes the weight of arbitration or litigation to force the main contractors to

take sub-contractors' claims seriously. ADR is suitable, and may be recommended, where there is a *"genuine misunderstanding"* but this scenario is not the typical case. A solicitor whose clients are principally sub/specialists contractors explained that he recommends litigation or arbitration when the main contractor is refusing to take his client's claim seriously:

"More often than not, a case comes into us because someone has not been paid and he has not been taken seriously.....(S)omebody is just being plain bloody-minded and often deceitfully bloody minded as well. Someone is deliberately orchestrating things and making life difficult. Very often, in my view, to talk about bringing in the heavy guns of litigation and arbitration basically because it concentrates their minds and that is often my perception of the best way forward to make people take my clients seriously."

Central to most of the legal interviewees' attitude about using ADR is the perception that, by the time the dispute reaches them, it is too late to recommend a conciliatory approach. The parties have already become entrenched in their positions and are demanding an *adversarial approach*. A solicitor who represents main contractors predominantly, denied that the adversarial approach is one adopted by the lawyer but one that they are presented with by the client, who arrives in the office having become personally involved in the dispute:

"There is an assumption that lawyers are responsible for that (adversarial approach) but, actually, I am not sure that is the case, because it comes back again to the fact that a lot of our clients get involved very personally and feel very aggrieved and a lot of site negotiations appear to be based on that, rather than a co-operative approach. They come to us expecting an adversarial approach....Not only is it what they expect and demand from us, but they have already set it up themselves, so that it has become an adversarial position."

There is a consensus amongst the legal interviewees that it is unlikely that they would recommend ADR when their clients are taking an adversarial approach and entrenched in their argument. There is agreement also amongst the legal advisors who represent sub-

contractors that ADR is unlikely to be a suitable choice of dispute resolution procedure when their clients have not been paid. In this situation, only a "writ" would suffice.

Although there is a duty¹² for barristers to mention ADR, the barrister interviewees feel that this is the role for the solicitors and that by the time they are consulted the dispute has "sharpened" and the parties are too far along the path of litigation or arbitration for ADR to be a viable option:

"We had hoped that clients would read the business press, and come to us and say, "Oh well, we want ADR." But they don't. I am at the sharpest end of disputes by the time things come to me, they are totally at war and you know, it will have been through the quantity surveyors, and it will have been through the solicitors, and as I have taken Silk, it has been through Junior Counsel. So when a case comes to me, they are not terribly interested in talking. They are interested in a result. So my perception of the Construction Industry is very much that it is about cash flow. It is about maximising gains or minimising losses and the idea that enhanced non-financial intangible benefits is actually an anathema to what I see in my daily practice. The theory is wonderful and it should all work... but it does not seem to."

2.1.5 Summary.

The legal advisors interviewed are aware of the problems which are inherent in the adversarial approach, which result in the perceptions held by contractors of the excessive costs, delay and confrontational nature of the formal systems of dispute resolution. Nevertheless, there are situations when this approach is deemed to be appropriate. Thus, for many of the legal interviewees, they will continue to recommend the formal systems when the "heavy guns" of litigation and arbitration are required because their client's claim is not being taken seriously. There is a perception that the adversarial approach is one which their clients demand of them and the legal interviewees asserted that they will not recommend ADR in these circumstances. Further, many of the legal interviewees are of the opinion that disputes between sub/specialists and main contractors may not be the

¹² Practice direction (1993) Chapter 2 para. 5.2.1

ideal disputes for ADR.

2.2 Advantages of ADR

2.2.1 Legal advisors perceptions of ADR.

As reported in chapter 4, the respondents to the postal survey hold perceptions that ADR is cheaper, quicker and less confrontational than the formal systems. The legal interviewees were asked to explain their perceptions of ADR and what the advantages and disadvantages of using it would be in disputes between main contractors and sub/specialist contractors. These perceptions are likely to influence their recommendation to use ADR.

2.2.2 Perception that ADR can be expensive.

One rather startling observation made by several legal advisors is that some forms of ADR are expensive. One barrister claimed that a mediation which her/his chambers had been involved in, was "costed" at over £10,000. Several other legal interviewees are of the opinion that mediation could become expensive. An experienced mediator would cost the same as a good arbitrator and it was estimated that a good mediator would charge £1,000 to £1,500 a day. This figure would escalate as the reading time for documents needs to be added. There is also a general accord that clients would be ill advised to attend a mediation without a legal advisor.¹³ The costs of having a solicitor in attendance for a complete day would not be negligible and were illustrated by a QC, who is a trained mediator:

"Of course, the cost of ADR is very high and if you are having a serious mediator, you are going to be paying him or her £1500-£2000 per day. You are going to have to have the legal team there as well. Maybe an expert on tap. It's actually the medium size cases that are the problem. In the big cases, it is justified."

Although some interviewees reason that if the dispute settles earlier rather than later it would save costs, interviewees evidenced uncertainty whether some ADR processes are a cheap option. If this is a more generally held perception amongst legal advisors, it is

¹³ Chapter 7 para. 4.3

likely to be a major influence on the choice of ADR, particularly in view of the concern expressed by the respondent about the costs of the formal systems.¹⁴

3 REASONS WHY ADR IS NOT BEING USED

3.1 Negative perceptions of ADR

The second and third hypotheses of the thesis are that negative perceptions are held by contractors and that these negative perceptions influence the choice of ADR. Chapter 5 confirms that two negative perceptions are indeed held by contractors: **The weakness of ADR is that it is non-binding and ADR can be used to create delay.** The legal interviewees were asked to comment on these negative perceptions and how, or if, they influence the choice of ADR.

3.1.1 Non-binding nature of ADR.

Many of the legal interviewees recognise that the non-binding nature of ADR need not be a weakness. Several pointed out that one of the major advantages of ADR is that it is non-binding and, thus, the parties are able to walk away from the procedures if they do not reach a satisfactory settlement for both parties. It was also recognized that, once a settlement is reached, a contract can be drawn up which delineates the agreement and would itself become contractually binding.

Despite these observations, most legal interviewees agree that their clients would perceive the non-binding nature of ADR as a disadvantage. Several stated that, when they had discussed ADR with their clients and explained that the procedures were non-binding, their client was uninterested, because it plays into the hands of the parties who wish to delay settlement. This view was illustrated by the comments of a barrister:

"..in the way the other party can use it to spin it out. With the reluctant defendants it is the ideal form of dispute resolution. It beats arbitration. You can go through all the motions and then say, ' I don't like the decision.' "

¹⁴ Chapter 4 section 1 paras 1.1.4, 1.2.2 and 1.2.2.2

The legal interviewees recognise the advantage of using binding procedures, in that it allows the parties to blame someone else if they fail to get what they believe they are entitled to or what they had told their senior management they would get:

"If you have a binding award or a judgment, the parties are going to have to live with it and it lets people off the hook."

3.1.2 Using ADR to create delay.

The legal interviewees were asked if there are any types of construction dispute where they will not recommend ADR and several asserted that they will not mention or recommend ADR when the other party is playing for time or refusing to pay. This is particularly so for the legal advisors who advise sub/specialist contractors. Here it was maintained that there is no incentive to use ADR.

A more cynical use of ADR was described by a leading construction barrister, who is a trained and experienced mediator. He admitted that a significant part of his practice is to create delay for his clients. (His clients are chiefly main contractors.) He maintained that ADR will help in this practice, as it is one of the *"principal uses"* for ADR and up to three months can be gained by using it:

"...This is a huge part of my practice. (delay) The main contractors want to delay paying sub-contractors, who, of course, want paying as soon as possible. Sub-contractors perceive ADR as just another excuse and main contractors view it as a way of delay...of course, they are keen on ADR; they are bound to be. Well, what you say is, "We can't fix the arbitration until we have had the mediation". So you could probably get three months anyway."

3.1.3 Legal advisors' perceptions that using ADR is a sign of weakness and ADR reveals too much of the case to the opposition.

The postal survey reveals that the respondents do not significantly hold the other negative perceptions tested: **Using ADR is a sign of weakness** and **ADR reveals too much of the case to the opposition**. Similarly, the legal interviewees do not perceive that using

ADR is a sign of weakness.¹⁵ However, there is some evidence from legal interviewees, who are experienced in using ADR that it can be used to discover the opposition's case. Two differing views were expressed in the legal interviews. On the one hand, several interviewees could not see why one would be frightened of revealing one's case, particularly if it was a good one. Conversely, others felt that this was a tactic that could be used in ADR. An experienced mediator and QC maintained that he is cautious about using ADR if the opposition have advisors who are experienced also in ADR. They would know how to use it tactically to find the weaknesses in the case. Further, he asserted that these tactics are now being explained in seminars on ADR:

*"... you use ADR to discover more about the other side's case and to discover your firm's perception of the weaknesses. A failed ADR can be better for you than a successful one and the very sophisticated will know how to use it adequately. The unsophisticated will fall for it. Those who are in the middle, which I suspect is the vast majority, will realise that if you have got ***** (A leading construction solicitors which promote ADR) on the other side or if you have got ***** (A specialist construction solicitors) on the other side or if you have got certain leading Counsel... then they will say "I'm not going into the lions' den with those people, because they know the procedure. They know how to use it. I am on unfamiliar ground and they are going to get some sort of advantage out of this that they can see and I can't." Everybody says this fear of ADR is totally groundless. It is not totally groundless. I was recently involved in a Seminar with a Partner of ***** (One of the above leading solicitors' firms) where he was actually telling people how to take advantage of a failed mediation. These are the tactics that you can use to gain an advantage out of the situation. I would be slow to get involved in mediation with that particular person and I am sure he would if I was on the other side. In fact, we both trained as mediators in the States."*

¹⁵ The length of the legal interview was limited to about one hour (Chapter 3 paras 9.3 and 9.4) and, therefore, the areas to be discussed had to be selected from the major issues of the research. The legal interviewees were not specifically asked about putting ADR clauses into construction contracts, which is a strategy proposed by the proponents of ADR to counter the perception that using ADR is a sign of weakness. See chapter 5 paras. 3-3.1

This degree of sophistication about ADR is not prevalent amongst the other legal interviewees. Nevertheless, this particular interviewee is a trained mediator and a senior member of the bar. It is possible that this attitude will be held eventually by others. This may not be the perception of all legal advisors, but it is worrying that experienced legal advisors believe in this potential for ADR, which may become another stratagem in the arsenal of dispute resolution procedures, which can be manipulated by legal advisors.

3.2 The perception that ADR is not appropriate for some construction disputes.

Chapter 6 considered the proposition that the choice of ADR is influenced by perceptions which are held as to the appropriateness of ADR to settle construction disputes. The areas where the parties would not consider ADR are centred around several issues: First, respondents would not consider using ADR if the other side are polarised in their view. Second, there is a perception that ADR should not be used when a legal principle is at stake or, the dispute is legally complex. Finally, certain financial sizes of dispute are deemed to be more suitable for some procedures of ADR than others.

3.2.1 Parties entrenched in positions.

There is general consensus from the legal advisors that ADR is not suitable when the parties are entrenched in their positions, which corroborates the perceptions of the respondents to the survey. Further, legal advisors find frequently that their clients are already polarised in their argument before they are consulted. The legal interviewees feel, generally, that in these circumstances a conciliatory ADR approach would not be appropriate. Most of the legal interviewees agree that ADR will work only if there is a willingness on both sides to settle or compromise and if this is not the case the formal systems are the only dispute procedures which legal advisors believe will work. One solicitor, who had used mediation several times, explained his view:

"I think some cases never mediate, some situations litigate from down the line. If one has developed a very strong stance, there is no way you are going resolve that problem without some sort of formal method."

Legal advisors expressed the opinion that, in small disputes, the parties are more involved

as personalities. In the very large disputes, which will most frequently involve large companies, often the problem is moved up to the senior management team. It was noted by an experienced barrister mediator that there is a negative value to mediation where people had told their senior management board that they have a good case. In this situation, the personality involved is unlikely to want to enter a non-binding mediatory or conciliatory process, where each side has to consider options. The preferred option is likely to be the formal systems where blame can be apportioned elsewhere:

"I act for big construction companies and, generally, there is always a man sitting opposite on the table sweating. He has told his boss, depending how senior he is, his Board, his fellow Directors, whatever, that he is going to recover a million pounds losses and expenses. I am telling him that he is going to recover £100,000 and he is sitting there thinking, how he is going to tell the Managing Director that the figure that he and the Claims Consultants cooked up during the course of the contract.....Nine times out of ten he says to himself, "I will let the Arbitrator make a decision because that way I can blame Counsel, I can blame Solicitors, I can blame the Arbitrator and nobody blames me.'"

3.2.2 Legal principles or legally complex disputes.

The legal advisors are in agreement with the respondents to the survey that ADR is not suitable where a legal principle is either undecided or there are conflicting Court of Appeal cases. Here, certainty is required, particularly when a number of similar cases may rely on the outcome. A solicitor described a current case on which he is advising, which involves an uncertain area of law. Both parties are prepared to take the risk in the final decision and are prepared to test their belief in the formal system:

"We have got one big case at the moment that revolves around an uncertain area of the law and the parties know that it is all or nothing. They are both not entrenched but if he (the judge) goes for A he wins hands down and the same for B. Okay, you could say that they both want to settle for the risk. But they are both quite happy and certain that they are right. The only way to do that is sort out the legal issue that is surrounding it."

3.2.3 Financial size of dispute.

The results of the survey indicates that contractors hold perceptions as to the suitability of certain types of dispute resolution procedures depending on the financial size of the dispute. Three ADR procedures, conciliation, mediation and adjudication, are regarded as significantly suitable for disputes under £1 million; thereafter, the formal systems are regarded as more suitable. Although there is no consensus amongst the legal interviewees about the suitability of ADR for different sizes of dispute, there is agreement that some disputes are too small to arbitrate or litigate, as the costs of these procedures outweigh the possible outcome. Interviewees pointed out that these procedures cost the same whether the dispute is large or small. The legal interviewees are generally of the opinion that where disputes are financially very large, the formal systems would have to be used.

Several of the legal advisors, including those who are experienced with using ADR, do not believe that, fundamentally, the size of dispute is relevant. Others are of the opinion that it is more suitable for smaller to middle sizes of dispute, where the formal systems are unlikely to be feasible. The solicitor who had the most experience of using mediation in construction disputes believes that it should be suitable for any size, but acknowledges that disputes worth less in value should be better using ADR. On the whole, the legal interviewees are of the opinion that disputes worth very considerable amounts of money are better served using the conventional approach.

3.2.4 Multi-party disputes.

In line with the perception of the respondents, who are neutral about the suitability of ADR for multi-party disputes, a similar view is held by the legal advisors. Most legal interviewees made no reference to this when asked for cases which are not appropriate, but some legal advisors who had experience of ADR are of this opinion that it is not good for multi-party disputes.

One solicitor who represents main contractors and has experienced several mediations holds a strong conviction that ADR is unsuitable for multi-party disputes, which involve the client, main contractor and sub-contractor. The main contractor is vulnerable in a mediation because, if the organisation makes concessions to the sub-contractor, it could

make its position weaker in the eyes of the client, who then assumes that the main contractor is accepting liability. The interviewee contended that disputes between client and main contractor must be settled before the sub-contractor. If this is correct, or becomes a generally held perception by legal advisors, the desire of sub/specialists to find a quicker method of resolving disputes with main contractors may not be found in mediation, when there is an on-going dispute between the main contractor and the client.

3.2.5 Appropriateness of adjudication for disputes between main contractors and sub/specialists contractors.

The problems that mediation presents for multi-party disputes may strengthen the requirement of adjudication, which has the added advantage of being binding to the end of the contract. At the time of the legal interviews, the Housing Grants, Construction and Regeneration Act 1996 had not been enacted, but the legal advisors were asked to comment on the suitability of adjudication for construction disputes. Many legal advisors are in support of the idea of a quick, cheap solution to problems on site as they arise, but believe adjudication is not suitable for more complex disputes:

"I think that adjudication has a place as a quick mechanism to resolve disputes and stop them festering...but if it is going to be used, as it is envisaged at the moment, as an unbreakable process within a 28 days period, then by definition you cannot resolve a complex dispute and get down to the rights and wrongs of it in that period."

The Government proposals for adjudication at the time of the interviews was disapproved of by several of the interviewees and others did not feel that they were in a position to comment. Some legal interviewees are concerned about the quality and experience of adjudicators and the ability to obtain their appointment at such short notice.¹⁶ Further, some believe that adjudication also uses an adversarial approach. For many of the legal interviewees, adjudication has a limited application for disputes which are financially small and not complex. There is some agreement that it would be good for main contractor and sub-contractor disputes which are concerned with the payment of money due:

¹⁶ See chapter 2 paras. 4.3-4.3.1

"they abide by this short sharp decision from the adjudicator....that is fine for small disputes or minor disputes, but when it gets major, people may not be able to afford to live with an interim decision, where they feel that the issues raised are so serious that it is not really capable of being dealt with adequately by an adjudication process."

The danger of adjudication for sub-contractors was highlighted by a solicitor who acts for main contractors. Adjudication may be a problem for the sub/specialist who does not win and then wishes to appeal the adjudicator's decision. This will have to wait until the end of the project, by which time the sub/specialist could be in serious financial difficulties.

3.3 Legal advisors' experience of using ADR.

The postal survey confirms that little use is made of ADR and the experience of the legal interviewees support this finding. Three of the interviewees had trained as mediators and, frequently, their experience is that, despite their being approached to act, the mediations rarely reached fruition. One barrister had done several mediations but was unsure if they settled because of the process or because they would have settled anyway. The experience of both the barrister mediators interviewed is that, when they are asked to act as mediators, what is really wanted is for them to act as a non-binding expert by giving their opinion on the facts.

Four solicitors had experienced mediation or a type of mediation. One dispute involved the government of a foreign country. One solicitor had been involved in three large mediations, all of which settled. The third solicitor had been involved in a dispute in the late stages which went to mediation and settled. A solicitor who was extremely opposed to ADR had been involved in a multi-party dispute where a type of mediation was used and which failed to settle.

Legal advisors who had suggested using ADR to clients reported it had been refused either because it was non-binding or because their clients were unprepared to use procedures which are untested. One solicitor had tried to persuade a client to try to use ADR (mediation) in a case which he believed was eminently suitable, because there was a possibility of future work with the other party. His client refused, because he felt, "one

was being put over on him, " and this was despite the mediator offering his services free of charge. Another solicitor who represented sub/specialist contractors commented that, whenever he mentioned ADR to main contractors, they refused to use it, even when they are founder members of CEDR (Centre for Dispute Resolution.)

3.4 Summary.

In summary, most of the legal advisors are not antagonistic towards ADR. Many are prepared to use it in suitable cases. However, there is a strong perception that many cases which reach them are unsuitable, due to the adversarial approach of their clients. When parties are entrenched in their positions, the legal advisors are of the opinion that ADR would be unlikely to work. There is a strong response from legal advisors representing sub/specialist contractors that ADR is inappropriate when main contractors are merely delaying payment and in such situations the formal systems are required. In line with the perceptions of the survey, the legal interviewees are, generally, of the opinion that some disputes are too small for the formal systems but that, for large financial sizes of disputes, the formal systems are, probably, preferable. Finally, several interviewees believe that ADR is unsuitable where multi-party disputes are concerned.

4 ROLE OF LEGAL ADVISORS IN ADR

4.1 Respondents perception of the involvement of legal advisors in ADR.

Two perceptions which had been identified in the literature and the legal interviews are that legal advisors are not recommending ADR and that the legal profession will hi-jack ADR. The respondents were asked to assess their level of agreement to these statements in the item pool of attitudes: **Legal advisors favour ADR** and **The legal profession will hi-jack ADR.**

Figure 72: Legal advisors favour ADR.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	2	15	110	60	11	198
%	1 %	7.6%	55.6%	30.3%	5.6%	100%

Cross tabulation of frequency and percentage of agreement for the survey population for the statement: Legal advisors favour ADR.

Figure 72 shows that 55.6% of the respondents are neutral to the statement that legal advisors favour ADR. The observed mean for the survey is 3.32 (SE 0.05) (95% CI: 3.22 - 3.42), which indicates a significant level of disagreement with the statement. The perception of the respondents is that legal advisors do not favour ADR.

Figure 73: The legal profession will hi-jack ADR

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	23	82	79	18	1	203
%	11.3%	40.4%	38.9%	8.9%	0.5%	100%

Cross tabulation of frequency and percentage of agreement for the survey population for the statement: The legal profession will hi-jack ADR.

Figure 73 indicates that 51.7% (strongly agree + agree) (11.3% + 40.4%) of the respondents agree that the legal profession will hi-jack ADR, the observed mean for the survey is 2.47 (SE 0.06) (95% CI: 2.37 - 2.60), which indicates a significant level of agreement with this statement. The respondents perceive that legal advisors will hi-jack ADR.

4.1.1 Analyses of difference between groups.

Both these statements are part of the item pool of attitudes tested by the MANOVA test, which analyses for differences between groups. The test did not yield a significant result for the interaction between "contractor type" by "turnover size", nor for the effect of "contractor type". There is a significant effect of "turnover size" on the item pool of

statements at the 0.05 level ($F = 1.43$; $df = 74/248$; $P = 0.022$). The individual test statistic for the statement **Legal advisors favour ADR** is ($F = 2.42$; $df = 2/159$; $p = 0.092$) and for the statement **The legal profession will hi-jack ADR**, it is ($F = 2.86$; $df = 2/159$; $p = 0.06$). Neither are significant at the 0.05 level of significance, but both are reported at the 0.10 level:

When the post hoc Scheffé test was performed on the variable **Legal advisor favour ADR**, respondents from the smallest turnover category differ significantly at the 0.05 level from those from the middle turnover group.

Figure 74: Legal advisors favour ADR.

Frequency Row %	strongly agree	agree	neutral	disagree	strongly disagree	Row total
£6million and under	1 1.2 %	8 9.8 %	55 67.1 %	15 24.6 %	3 3.7 %	82 43.9 %
£ 5 0 million-	0 0 %	2 3.5 %	29 50.9 %	22 38.6 %	4 7 %	57 30.5 %
£ 5 0 Million +	1 2.1 %	5 10.4 %	19 39.6 %	19 39.6 %	4 8.3 %	48 25.7 %
Column Total	2 1.1 %	15 8 %	103 55.1 %	56 29.9 %	11 5.9 %	187 100 %

Cross tabulation of frequency and percentage of level of agreement for "turnover size" for the statement: Legal advisors favour ADR.

Figure 74 shows that 67.1% of respondents with a turnover of £6 million and under are neutral about the statement that legal advisors favour ADR. As the turnover category increases, the respondents are less neutral. 45.6% of respondents in the middle turnover category disagree (disagree + strongly disagree) (38.6% + 7%), with the statement. The percentage is slightly higher for respondents from the largest turnover group, 47.9% are in disagreement with the statement. (disagree + strongly disagree) (39.6% + 8.3%) The group mean for the smallest turnover group is 3.13 (95% CI: 2.98- 3.28), which suggests the group neither agree or disagree. In comparison, the mean for the middle turnover group is 3.49 (95% CI: 3.31 - 3.67), which is a significant level of disagreement.

Respondents from the smallest turnover category are significantly more likely to be neutral

about the statement that **lawyers recommend ADR** than the middle turnover group, who significantly disagree. It is noted that respondents from the largest turnover group are also in disagreement with this statement. The observed mean for this group is 3.42 (95 % CI: 3.16-3.67), which is a significant level of disagreement.

When the Scheffé post hoc test was performed on the variable **Legal Advisors will hi-jack ADR**, no two groups significantly differ at the 0.05. Therefore, no turnover group differs significantly from the survey population, which is significantly in agreement with the statement.

To summarise, the respondents are in agreement that lawyers will hi-jack ADR and no groups differ in this perception. Further, there is a perception held by contractors that legal advisors do not recommend ADR, although organisations with a turnover of £6 million and under are more likely to be neutral about this. This result is supported by the responses of those respondents who had rejected a proposal to use ADR or had a proposal to use it rejected. These respondents were asked to measure their level of agreement with the statement: **Our legal advisor did not recommend using ADR**. Ten respondents agree with statement and this includes 4, who strongly agree. (See figure 75) If the experience of the survey is that legal advisors do not recommend ADR, this is likely to be a factor that contractors take into consideration when choosing ADR.

Figure 75: Our legal advisor did not recommend using ADR.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	4	7	4	6	1	22

Cross-tabulation of frequency for the respondents who had refused to use ADR or had a proposal to use ADR refused for the statement: Our legal advisor did not recommend using ADR.

4.2 USING LEGAL ADVISORS IN ADR PROCEDURES.

In order to assess the future role of legal advisors in the different ADR procedures, the respondents were asked to assess how much they agree or disagree with using a legal advisor in the following dispute resolution procedures, when involved in a construction

dispute:

negotiation,

litigation,

arbitration,

mediation,

conciliation,

adjudication,

Dispute Review Board (DRB),

Executive Tribunal.

A space was provided for the respondents to select any other procedure, but this was not used. Negotiation was included in the dispute resolution processes, as it is a recognized process for resolving conflict. In negotiation, the parties adjust their demands to achieve an acceptable compromise.¹⁷

First, the results are reported for the survey population. Second, differences between groups are analysed.

When the results for the survey population are analysed for the formal procedures of arbitration and litigation, the respondents show a clear agreement about involving legal advisors.

Figure 76: Using a lawyer in litigation

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	103	70	18	10	4	205
%	50.2%	34.1%	8.8%	4.9%	2%	100%

Cross tabulation of frequency and percentage for the level of agreement from the total sample for the question: How much you agree or disagree with using a legal advisor in litigation?

¹⁷ Kennedy G. Benson J. and McMillan J. (1987) Managing Negotiations Hutchinson Business: London.

Figure 76 shows that 84.3 % (50.2 % + 34.1 %) (strongly agree + agree) agree with using a legal advisor in litigation and this includes over 50% of the survey who strongly agree. The observed mean is 1.74 (SE 0.07) (95 % CI: 1.59 - 1.85), which is an extremely high significant level of agreement with the statement. It is unlikely that legal advisors will lose influence in this area of dispute resolution. This is not a surprising result, as in the highest courts only barristers have the right of audience.

Figure 77: Using a lawyer in arbitration

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	58	86	40	18	3	205
%	28.3%	42%	19.5%	8.8%	1.5%	100%

Cross tabulation of frequency and percentage for the level of agreement for the total sample for the question: How much you agree or disagree with using a legal advisor in arbitration?

70.3% (28.3% + 42%) (strongly agree + agree) of the respondents agree with using a legal advisor in arbitration. (Figure 77) The observed mean is 2.13 (SE 0.07) (95% CI: 1.98 - 2.26), which is a significant level of agreement. If this is compared with the figures for litigation, it is noticeable that there is higher level of agreement about using legal advisors in litigation. (See figure 76) It still indicates a high level of dependence on legal advisors when arbitration is used.

Figure 78: Using legal advisor in negotiation

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	7	40	65	65	26	203
%	3.4%	19.7%	32%	32%	12.8%	100%

Cross tabulation of frequency and percentage for the level of agreement for the total sample for the question: How much you agree or disagree with using a legal advisor in negotiation?

By comparison with the formal procedures, when the respondents were asked to assess

whether they agree or disagree with using a legal advisor in negotiation, 44.8% disagree (disagree + strongly disagree) (12.8% + 32%) with the statement. (Figure 78) The observed mean is 3.31 (SE 0 .07) (95 % CI: 3.19 - 3.48), which is a significant level of disagreement. As noted earlier, 73 % of the survey will consider resolving disputes without legal advice, but it was noted that there are situations where legal advice is sought. This result supports this finding. The respondents and interviewees stated that they attempt to negotiate a settlement when a dispute arises and it is only when the negotiations fail that the parties turn to legal advisors. However, the survey data suggests that the initial involvement of legal advisors will depend on the complexity of the dispute, the legal issues and a perception of how entrenched the parties are in their positions.¹⁸

Figure 79: Using a legal advisor in mediation

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	6	51	91	46	10	204
%	2.9%	25 %	44.6%	22.5%	4.9%	100%

Cross tabulation of frequency and percentage for the level of agreement for the total sample for the question: How much do you agree or disagree with using a legal advisor in mediation?

Figure 79 indicates that 44.6% of the respondents are neutral about using a legal advisor in mediation. The observed mean for the statement is 3.01 (SE 0 .06) (95 % CI: 2.90 - 3.18), which indicates that there is no significant agreement or disagreement with the statement about using a legal advisor in mediation.

¹⁸ Chapter 4 para. 1.2.2.3

Figure 80: Using a legal advisor in conciliation

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	6	47	92	48	10	203
%	3%	23.2%	45.3%	23.6%	4.9%	100%

Cross tabulation of frequency and percentage for the level of agreement for the total sample for the question: How much do you agree or disagree with using a legal advisor in conciliation?

Figure 80 indicates that 45.3% of the respondent are neutral to the statement about using a legal advisor in conciliation. The observed mean is 3.04 (SE 0.06) (95% CI: 2.92 - 3.18), which indicates that there is no significant agreement or disagreement. This result is very similar to mediation.

Figure 81: Using a legal advisor in adjudication.

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	6	78	72	36	11	203
%	3%	38.4%	35.5%	17.7%	5.4%	100%

Cross tabulation of frequency and percentage for the level of agreement for the total sample for the question: How much do you agree or disagree with using a legal advisor in adjudication?

41.4% (strongly agree + agree) (3% + 38.4%) of the respondents agree with the statement about using a legal advisor in adjudication. (Figure 81) The observed mean is 2.84 (SE 0.07) (95% CI: 2.73 - 3.00), which again suggests that the respondents do not either significantly agree or disagree. It is noted that the upper level of the confidence interval is three (3), which is close to a significant level of agreement. Adjudication is more similar to arbitration than either conciliation or mediation. The "juridification"¹⁹ of arbitration has been blamed on the involvement of the legal profession and, thus, the potential involvement of legal advisors in adjudication is of interest. The role that legal advisors perceive for themselves in this ADR procedure is likely to be instrumental in its

¹⁹ Flood J. and Caiger A. (1993) op cit

eventual development.²⁰ Earlier, it was noted that some of the legal interviewees perceive that adjudication uses an adversarial approach.

Figure 82: Using a legal advisor in a Dispute Review Board

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	9	58	77	40	12	196
%	4.6%	29.6%	39.3%	20.4%	6.1%	100%

Cross tabulation of frequency and percentage for the level of agreement for the total sample for the question: How much do you agree or disagree with using a legal advisor in a Dispute Review Board?

Nearly 40% of the respondents are neutral about using a legal advisor in a DRB. (See figure 82) The observed mean is 2.94 (SE 0.07) (95 % CI: 2.83 -3.10), which reveals that the survey does not significantly agree or disagree with the statement.

Figure 83: Using a legal advisor in an Executive Tribunal

	Strongly agree	agree	neutral	disagree	strongly disagree	Total
Frequency	13	61	78	27	13	192
%	6.8%	31.8%	40.6%	14.1%	6.8%	100%

Cross tabulation of frequency and percentage for the level of agreement the total sample for the question: How much do you agree or disagree with using a legal advisor in an Executive Tribunal?

Figure 83 shows that over 40% of the survey are neutral about using a legal advisor in an Executive Tribunal. The observed mean is 2.82 (SE 0.07) (95 % CI: 2.71 - 2.99), which is a significant level of agreement with this statement. It is noted that the highest end of the confidence interval is very close to three (3), which suggests that this is a weak significant level of agreement.

²⁰ Brooker P. and Lavers A. (1994) op cit
Some lawyers see that adjudication is an adversarial procedure. See chapter 7 para. 3.2.5

4.2.1 Summary respondents attitudes to using legal advisors in ADR procedures.

The results demonstrate that the survey population is very significantly in agreement with the statements about using legal advisors in both litigation and arbitration. In comparison, the respondents significantly disagree about using legal advisors in negotiations. The survey population is only significantly in agreement about using legal advisors in one ADR procedure: An Executive Tribunal. It is suggested that this procedure is a relatively formalised method of dispute resolution; each protagonist gives a presentation to the senior executives of each side and a third party neutral. The executives must be in a position to settle. In the US, this procedure is called a "mini-trial". The evidence from the legal interviews is that the legal advisors perceive that they have a role to play in ADR.²¹ However, there is no consensus as to the extent of their involvement; that is, whether the involvement is in a consultative role or, more active one, such as presenting the arguments for their clients. The findings above would suggest that the respondents are in favour of legal involvement for some procedures from their own choice. The legal advisors, and the legal profession, in general, are trained in presenting arguments and thus, the perception, for many respondents, is that they are the obvious choice when an argument needs to be presented. This was explained by an interviewee representing a major main contracting organisation:

"I think that very often they will. (Legal advisor be involved in ADR) If the dispute is about the interpretation of a contract, it is not something you are going to be satisfied with unless it is a legal interpretation and a lot of disputes do come down to what the understanding of the terms of the contract are. I think that there is a feeling that lawyers can represent the argument better than most professions could anyway. You know there would be a temptation to use them for that anyway, after all, that is what they do day in day out."

The respondents do not significantly agree or disagree about using legal advisors in mediation, conciliation or adjudication. It is noted that, for adjudication, the result is

²¹ Chapter 7 para. 4.3

extremely close to a significant level of agreement. This procedure is again the closest of all the ADR procedures to arbitration. As one main contractor interviewee stated:

"Where it is informal, then there probably is no need for a lawyer, but once it is fairly formal then you do need them. I think that is perhaps unfortunate, but likely."

4.2.2 Analysis of differences between groups.

The MANOVA test was used to discover if there are any differences between groups. The effect of "contractor type" and "turnover size" and the interaction of both these groups were examined in the test. Also, the differences for the effect of another group was tested which was called the "Legal Advisor User" group. This group was further sub-divided into those who said "Yes" they would resolve disputes without legal advisors (the "Yes" group) and those who said "No" (the "No" group). The group who responded with "don't know" was collapsed into the "No" group, because the objective of the test is to see if there are any differences between responses from those who said they would consider resolving a dispute without a legal advisor and the rest of the respondents.

The MANOVA test procedure on the statements about using a legal advisor in different dispute resolution procedure did not yield significant test statistics in the following interactions and effects: the interaction between "contractor type" by "turnover size" by "legal advisor user", the interaction between "contractor type" by "legal advisor user", the interaction between "turnover size" by "legal advisor user" and the effect of "contractor type".²²

²² The MANOVA test statistic did yield a significant effect for "turnover size", but when the individual test statistics were inspected the difference was for the statements concerning using a legal advisor in litigation and arbitration. When the difference is analysed, it reveals that all contractors agree with using legal advisors in both formal systems, but that contractors in the smallest turnover group are significantly less in agreement. The differences are ones of level of agreement, rather than differences of opinion. This is not reported, as the research is concerned with the use of legal advisors in ADR.

4.2.2.1 Effect of "turnover size" by "legal advisor user"

Although there is no significant MANOVA test statistic for the effect of "turnover size" by "legal advisor user", the independent test statistic for conciliation is ($F = 2.38$; $df = 2/167$; $p = 0.095$), which is reported as a trend at the 0.10 level. This indicates that there is a difference between "turnover size" and "legal advisor user" on the level of agreement with the statement about using a legal advisor in conciliation.

Figure 84: Cross tabulation of the observed means for "turnover size" by "legal advisor user" for level of agreement in using a legal advisor in conciliation"

"turnover size"	"Legal advisor user" Would resolve dispute without advice from legal advisor		Group Total
	"Yes" group	"No" group	Mean
	Mean	Mean	
£6 million and under "Using a legal advisor in conciliation"	3.18	3.00	3.13
Under £50 Million but over £6 million "Using a legal advisor in conciliation"	3.39	2.59	3.16
£50 million and over "Using a legal advisor in conciliation"	2.91	2.69	2.85
Group Total	3.17	2.80	3.07

Multiway table of observed means of level of agreement for respondents from different "turnover size" by "legal advisor user" sub-groups for the question: How much do you agree or disagree with using a legal advisor in conciliation?

A cross tabulation of the observed means for each sub-group reveals that the difference is between the "Yes" and "No" group for the middle turnover category. (Figure 84)

Respondents with a turnover of under £50 million but over £6 million who are in the "Yes" group have a high level of disagreement (3.39) with the statement about how much they agree with using a legal advisor in conciliation. In comparison, respondents in the same turnover category who are in the "No" group have a high level of agreement with

using a legal advisor in conciliation (2.59).

4.2.2.2 Interaction between "turnover size" by "contractor type"

There is no significant interaction between "turnover size" by "contractor type", but when the individual scores for the different dispute resolution processes are scrutinised, two variables are significant at the 0.05 level. There is a significant difference in the response for groups defined by "turnover size" by "contractor type" on the level of agreement about using a lawyer in both an Executive Tribunal and a DRB. The individual test statistic for the statement regarding an Executive Tribunal is ($F = 3.31$; $df = 2/167$; $p = 0.039$) and for a DRB is ($F = 4.18$; $df = 2/167$; $p = 0.017$). Main contractors and sub-contractors from different turnover groups differ in their response to the statements about using legal advisors in both an Executive Tribunal and a DRB. In order to find which sub groups differs in their response, cross tabulations of the observed means for each sub groups were examined for both an Executive Tribunal and a DRB.

Figure 85: Cross tabulation of observed means for "contractor type" by "turnover size" in the level of agreement for using a legal advisor in an Executive Tribunal.

"turnover size"	"contractor type"		Group Total
	Main Contractor	Sub Contractor	Mean
	Mean	Mean	
£6 million and under "Using a legal advisor in the Executive Tribunal"	2.78	2.75	2.76
Under £50 Million but over £6 million "Using a legal advisor in the Executive Tribunal"	3.42	2.62	3.05
£50 million and over "Using a legal advisor in the Executive Tribunal"	2.71	2.70	2.71
Group Total	2.96	2.70	2.84

Multiway table of observed means for the level of agreement for "turnover size" by "contractor type" for the question: How much do you agree or disagree with using a legal advisor in an Executive Tribunal?

Figure 85 shows that the significant difference between sub-groups is between main contractors and sub/specialist contractors in the middle turnover category. Main contractors from this turnover group disagree (3.42) with the statement about using a legal advisor in a DRB. In comparison, sub/specialist contractors from the same turnover group have a high level of agreement (2.77). It is noted that main contractors in the middle turnover category disagree with the statement about using a legal advisor in a DRB, whereas all other sub-groups are in agreement. This sub-group holds a different perception from the other groups. Main contractors in the middle turnover group are less likely to use a legal advisor in a DRB.

Figure 86: Cross tabulation of observed means for "turnover size" by "contractor type" in level of agreement for using a legal advisor in an Executive Tribunal

"turnover size"	"contractor type"		Group Total
	Main Contractor	Sub Contractor	Mean
	Mean	Mean	
£6 million and under "Using a legal advisor in DRB"	2.85	2.94	2.90
Under £50 Million but over £6 million "Using a legal advisor in the DRB"	3.45	2.77	3.14
£50 million and over "Using a legal advisor in the DRB"	2.78	2.80	2.78
Group Total	3.01	2.87	2.95

Multiway table of observed means for the level of agreement for different "turnover size" by "contractor type" group for the question: How much do you agree or disagree with using a legal advisor in an Executive Tribunal?

Figure 86 shows that the significant difference between sub-groups on the level of agreement with using a lawyer in the an Executive Tribunal is between main and sub/specialist contractors in the middle turnover category. Main contractors with this

turnover size strongly disagree (3.42) with using a legal advisor in a DRB. In comparison, sub/specialist contractors in the same turnover category have a high level of agreement, (2.62) whereas, main contractors from the middle turnover group disagree with using a legal advisor in an Executive tribunal, which is a difference of opinion from all other sub-groups, which are in agreement. Main contractors in the middle turnover category are less likely to use a legal advisor in an Executive Tribunal. The data from the follow-up interviews did not reveal any explanation for this difference.

The difference which is observed in "contractor type" by "turnover size" for using legal advisors in the Executive Tribunal and the DRB is the same sub-group of main contractor in the middle turnover category. This sub-group is less likely than any of the other sub-groups to use legal advisors in either of these two ADR procedures.

4.2.2.3 Effect of "Legal advisor user" group.

The MANOVA test statistic for the effect of "legal advisor user" is ($F = 3.30$; $df = 8/160$; $p = 0.002$), which indicates that there is a significant effect, at the 0.05 level, for the different "legal advisor user" sub-groups on the level of agreement for the statements concerning using a legal advisor in the different dispute processes. Respondents who would consider resolving construction disputes without legal advice ("Yes" group) significantly differ in their response to using legal advisors in different dispute resolution processes from respondents who would not or did not know whether they would consider resolving a dispute without a legal advisor ("No" group). When the individual MANOVA test statistic for each type of dispute resolution process was examined, four processes are significant at the 0.05 level and two processes are significant at the 0.10 level. The individual test statistics are as follows:

Significant at the 0.05 level.

Negotiation: ($F = 17.36$; $df = 1/167$; $p = 0.001$)

Mediation: ($F = 18.35$; $df = 1/167$; $p = 0.001$)

Conciliation: ($F = 11.01$; $df = 1/167$; $p = 0.001$)

Adjudication: ($F = 6.33$; $df = 1/167$, $p = 0.058$)

Significant at the 0.10 level and reported as a trend.

DRB: (F = 3.60; df = 1/ 167; p = 0.060)

Executive Tribunal: (F = 3.63; df = 1/ 167; p = 0.058)

There is no significant test statistic for litigation or arbitration, therefore, there is no significant difference between the group who would consider resolving a dispute without a lawyer and those who would not. It was reported earlier that the survey population are significantly in agreement with using a legal advisor in both these procedures.²³

In order to discover where the differences lay in the "legal adviser user" group, cross tabulations were analysed for the level of agreement for each dispute resolution process which had a significant MANOVA test statistic. The "legal adviser user" group is divided into the "Yes" group who are respondents who would consider resolving a dispute without using a legal advisor and the "No" group who are respondents who would not or did not know whether they would resolve a dispute without a legal advisor.

Figure 87: Cross tabulation of "legal adviser user" by using a legal adviser in negotiation.

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
"Yes"	4 2.7%	20 13.4%	47 31.5%	56 37.6%	22 14.8%	149
"No"	3 5.6%	20 37%	18 33.3%	9 16.7%	4 7.4%	54
Column Total	7 3.4%	40 19.7%	65 32%	65 32%	26 12.8%	203 100%

Cross tabulation of frequency and percentage for the level of agreement for "legal adviser" groups on the question: How much do you agree or disagree with using a legal adviser in negotiation?

Figure 87 shows that 52.4% (37.6% + 14.8%) (disagree + strongly disagree) of the "Yes" group disagree with using a legal adviser in negotiation. The group mean is 3.52

²³ Chapter 7 para. 4.2

(95% CI: 3.36 - 3.68), which is a significant level of disagreement. In comparison, only 24.1% (16.7 + 7.4) (disagree + strongly disagree) of the "No" group disagree. The group mean is 2.84 (95% CI: 2.57 - 3.12), which reveals that the "No" group do not significantly agree or disagree. The MANOVA test statistic ($F = 17.36$; $df = 1/167$; $p = 0.001$) indicates that significantly more of the "Yes" group disagree with using a legal advisor in negotiations than the "No" group.

This result is not surprising, as one would expect the "Yes" group to disagree more with the need to use a legal advisor in negotiation. What is notable is the relatively high percentage of the "Yes" group who are neutral to the statement (31.5%). When the reasons were analysed about why the respondents would or would not resolve a dispute without a legal advisor,²⁴ it was reported that many respondents will resort to legal advice when certain conditions are perceived to apply. Thus, when there is a need to know the strengths and weaknesses of their case, when the other party is entrenched in their position, when the dispute is complex (legally or technically) or when negotiations have failed, legal advice is sought. It is suggested that this explains the relatively high level of neutrality about using legal advisors in the negotiation process by the respondents who would resolve disputes without legal advisors.

Figure 88: Cross tabulation of "legal advisor user" by using a legal advisor in mediation.

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
"Yes"	3 2%	30 20.1%	70 47%	37 24.8%	9 6%	149
"No"	3 5.5%	21 38.2%	21 38.2%	9 16.4%	1 1.8%	55
Column Total	6 2.9%	51 25%	91 44.6%	46 22.5%	10 4.9%	204 100%

Cross tabulation of frequency and percentage of the level of agreement for "legal advisor user" groups for the question: How much do you agree or disagree with using a legal advisor in mediation?

²⁴ Chapter 4 para. 1.2.2.3

Figure 88 reveals that 43.7% (5.5% + 38.2%) (strongly agree + agree) of the "No" group agree with the statement about using a legal advisor in mediation. The group mean is 2.64 (95% CI: 2.41 - 2.89), which is significant level of agreement. In contrast, 30.8% (24.8% + 6%) (disagree + strongly disagree) of the "Yes" group disagree with using a legal advisor in mediation. The group mean is 3.16 (95% CI: 3.02 - 3.31), which is a significant level of disagreement. The MANOVA test statistic indicates that there is significant level of difference between the two groups at the 0.05 level. The "Yes" group disagree with the statement about using a legal advisor in mediation, whereas the "No" group agree. This is a difference in perception. It is notable that 47% of the "yes" group are neutral. This level of neutrality is considered below.

Figure 89: Cross tabulation of "legal advisor user" by using a legal advisor in conciliation.

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
"Yes"	3 2%	30 20.3%	69 46.6%	37 25%	9 6.1%	148
"No"	3 5.5%	17 30.9%	23 41.8%	11 20%	1 1.8%	55
Column Total	6 3%	47 23.2%	92 45.3%	48 23.6%	10 4.9%	203 100%

Cross tabulation of frequency and percentage for the level of agreement for "legal advisor user" groups on the question: How much do you agree or disagree with using a legal advisor in conciliation?

An examination of figure 89 reveals that 35.4% (30.9% + 5.5%) (agree + strongly agree) of the "No" group agree with using a legal advisor in conciliation. The group mean is 2.76 (95% CI: 2.52 - 3.00), which signifies that there is no significant level of agreement or disagreement. 30.1% (25% + 6.1%) (disagree + strongly disagree) of the "Yes" group disagree with using a legal advisor in conciliation. The group mean is 3.16 (95% CI: 3.02 - 3.31), which suggests that the "Yes" group significantly disagree. The MANOVA test statistic indicates there is a significant difference at the 0.05 level and the difference is that the "Yes" group disagree with the statement, whereas the "No" group are neutral.

It is noted that the "Yes" group have high levels of neutrality about using a legal advisor for both mediation and conciliation. (47. % and 46.8% respectively) This level of neutrality may be converted to agreement if the other party to the dispute intends to use a legal advisor, which is discussed below.

Figure 90: Cross tabulation of "legal advisor user" by using a legal advisor in adjudication.

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
"Yes"	3 2%	56 37.6%	52 34.9%	28 18.8%	10 6.7%	149
"No"	3 5.6%	22 40.7%	20 37%	8 14.8%	1 1.9%	54
Column Total	6 3%	78 38.4%	72 35.5%	36 17.7%	11 5.4%	203 100%

Cross tabulation of frequency and percentage for the level of agreement for "legal advisor user" group on the question: How much do you agree or disagree with using a legal advisor in adjudication?

Figure 90 shows that 46.3% (5.6% + 40.7%) (strongly agree + agree) of the "No" group agree with the statement about using a legal advisor in adjudication. The group mean is 2.64 (95% CI: 2.40 - 2.89), which is a significant level of agreement. What is interesting for adjudication is the large number of respondents in the "Yes" group who also agree that they would use a legal advisor in the process, 39.6%. (37.6% + 2%) (strongly agree + agree). The mean for the "Yes" group is 2.95 (95% CI: 2.79 - 3.11), which is neither significantly agreeing nor disagreeing. In both conciliation and mediation, the "Yes" group disagree with using a legal advisor but, for adjudication, they are neutral. (See figure 89 and 88.)

Figure 91: Cross tabulation of "legal advisor user" by using a legal advisor in a DRB.

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
"Yes"	6 4.2%	38 26.6%	57 39.9%	32 22.4%	10 7%	143
"No"	3 5.7%	20 37.7%	20 37.7%	8 15.1%	2 3.8%	53
Column Total	9 4.6%	58 29.6%	77 39.3%	40 20.4%	12 6.1%	196 100%

Cross tabulation of frequency and percentage for the level of agreement for "legal advisor user" group for the question: How much do you agree or disagree with using a legal advisor in a Dispute Review Board?

Figure 91 shows that 43.4% (5.7% + 37.7%) (strongly agree + agree) of the "No" group agree with the statement about using a legal advisor in a DRB. The "No" group mean is 2.72 (95% CI: 2.47 - 2.94), which is a significant level of agreement. 30.8% (4.2 + 26.6) (strongly agree + agree) of the "Yes" group agree. The mean for the "Yes" group is 3.05 (95% CI: 2.89 - 3.21), which signifies that *this group is not* significantly agreeing or disagreeing. The significant difference is that the "No" group agree with using a legal advisor in a DRB, whereas the "Yes" group are neutral.

Executive Tribunal

Figure 92: Cross tabulation of "legal advisor user" by using a legal advisor in a Executive Tribunal.

Frequency %	Strongly agree	agree	neutral	disagree	strongly disagree	Row Total
"Yes"	8 5.7%	42 29.8%	59 41.8%	21 14.9%	11 7.8%	141
"No"	5 9.8%	19 37.3%	19 37.3%	6 11.8%	2 3.9%	51
Column Total	13 6.8%	61 31.8%	78 40.6%	27 14.1%	13 6.8%	192 100%

Cross tabulation of frequency and percentage for the level of agreement for "legal advisor user" groups for the question: How much do you agree or disagree with using a legal advisor in an Executive Tribunal?

Figure 92 shows that 47.1% (9.8% + 37.3%) (strongly agree + agree) of the "No" group agree with the statement about using legal advisor for an Executive Tribunal. The group mean is 2.68 (95% CI: 2.36 - 2.90), which indicates a significant level of agreement. It is interesting that only 22.7% (14.9% + 7.8%) (disagree + strongly disagree) of the "Yes" group disagree. The mean for the "Yes" group is 2.92 (95% CI: 2.76 - 3.09), which signifies that there is no significant agreement or disagreement. The response is similar to the DRB (Figure 91) in that the significant difference is that the "No" group are in agreement with using a legal advisor, whereas the "Yes" group are neutral.

4.2.2.4 Summary

The MANOVA test statistic reveals that there are differences between groups in the survey about using legal advisors in different dispute resolution processes. These differences are likely to affect the potential influence and role of legal advisors in ADR. The results indicate that there is no interaction between "turnover size" by "legal advisor user" on the dispute resolution processes, but a trend was discussed for the individual process of conciliation. Organisations with a turnover of under £50 million but over £6 million who would resolve a construction dispute without legal advice are less likely to use a legal advisor in conciliation than organisations with the same turnover who would not resolve a dispute without a legal advisor.

There is a significant interaction between "contractor type" and "turnover size" on the individual variables for a DRB and an Executive Tribunal. Main contractors in the middle turnover category show a high level of disagreement with the statement about using a legal advisors in both a DRB and an Executive Tribunal, in comparison to sub-contractors in the same turnover group, who indicate a high level of agreement. Further, main contractors in the middle turnover group hold a different opinion from all the other groups of "contractor type" and "turnover size". They are in disagreement about using a legal advisor for both a DRB and an Executive Tribunal, whereas all other groups are in agreement. This group are less likely to use legal advisors for both these procedures than the other groups.

Finally, there is a significant difference between respondents who said they would resolve disputes without a legal advisor (the "Yes" group) and those who said that they would not or did not know (the "No" group), on their level of agreement in using legal advisors in the different dispute resolution processes. (See Figure 93 below) For negotiation, the "Yes" group disagree with the statement that they would use a legal advisor, whereas the "No" group are neutral. For mediation, the "Yes" group disagree with using legal advisors and the "No" group, agree but this included a high level of neutrality. For conciliation, the "Yes" group disagree with using a lawyer and the "No" group are neutral. For adjudication, the "Yes" group are neutral about using legal advisors, whereas the "No" group agree. For a DRB, the "No" group disagree about using a legal advisor, whereas the "Yes" group are neutral. Lastly, for an Executive Tribunal, the "Yes" group are neutral and the "No" group are in agreement. These perceptions are likely to influence the use of legal advisors in the different ADR procedures.

Figure 93: List for "legal advisor user" groups for their level of agreement with using legal advisors in different dispute resolution processes for "Yes" group and "No" group.

	"Yes" Group Will consider resolving disputes without legal advisor			"No" group. Will not consider resolving a dispute without a legal advisor		
	Agree	Neutral	Disagree	Agree	Neutral	Disagree
negotiation			*		*	
mediation			*	*		
conciliation			*		*	
adjudication		*		*		
DRB		*		*		
Executive Tribunal		*		*		
litigation	*			*		
arbitration	*			*		

Table recording the level of agreement of the "Yes" and "No" ("legal advisor user" group) for the questions: How much do you agree or disagree with using legal advisors in the following dispute resolution procedures?

The "Yes" group are in disagreement about using legal advisors in all the above dispute

resolution processes except for adjudication, a DRB and an Executive Tribunal where they are neutral. The literature has described both adjudication and an Executive tribunal as more formalised procedures of dispute resolution than mediation and conciliation.²⁵ A DRB, would, normally, be confined to large projects, which inevitably can involve large sums of money.²⁶ The research data provides evidence, that when disputes involve large sums of money, the formal procedures are preferred²⁷ and it has been stated above that for arbitration and litigation the respondents are significantly in agreement with using a legal advisor. It is suggested that these perceptions may explain the response for the level of neutrality by the "Yes" group for those ADR procedures which are more formal than mediation and conciliation.

It is also noted that, for adjudication, which is more similar to arbitration than the other ADR procedures, there is a high level of neutrality from the "Yes" group about using legal advisors. The skills of an advocate are likely to be necessary for more formal ADR procedures and for these procedures the respondents may perceive that there is a role for legal advisors, who are trained in advocacy. As an interviewee of a large contracting firm commented:

"Yes. I think that there is a feeling that lawyers can represent the argument better than most professions.... You know there would be a temptation to use them for that anyway, after all, that is what they do day in day out."

The question also arises as to what will happen if one disputant in an ADR procedure intends to use a legal advisor and the other does not. Research into the experience of arbitration reveals that the parties began to bring along their lawyers and this practice

²⁵ Milne M. (1995) Adjudication - The Fair Way Forward? Construction Law Journal Vol 11 No 6
Latham M. (1994) op cit

²⁶ Jaffe M. E. (1993) ADR in Construction International Corporate Law Litigation Yearbook.

²⁷ Chapter 6 para 1.6

increased and others began to use barristers.²⁸ In the follow-up interviews, the respondents indicated that, if the opposite party intends to use a legal advisor in ADR, it is likely to influence their decision about legal representation. Although many perceive that one of the main advantages about ADR is the fact that one can dispense with the need for legal advisors, it is recognized that this would depend on the dispute in question. Further, when interviewees were asked if they would use a legal advisor if the other side intended to, many were of the opinion that this will force the issue or it would be like *"lambs to the slaughter."* It was stated by one follow-up interviewee that once a lawyer is involved by one side it would have to be *"matched"*:

"It seems to me that people will use a lawyer or barrister and if one side has got one then they've all got to have one too."

As one main contractor explained:

"If you asked me; do you think it is necessary to involve a lawyer? I would say no. I would try to avoid using a lawyer. I would also try to persuade the other side to do the same. But if the opposition did not feel comfortable and they say they have to get their lawyers because they were not too sure or not confident, we would have to get a lawyer."

One of the claims about the ADR procedures is that the parties retain control over their own dispute. The criticism of litigation and arbitration is that the parties lose control because of the complexity of the procedures. For a DRB, an Executive Tribunal and adjudication there is a considerable level of support for using a legal advisor by the "No" group and a high level of neutrality from the "Yes" group. One factor that caused arbitration to become "juridified" was the involvement of lawyers.²⁹ If legal advisors are involved in the new ADR processes, it is likely that they will become formalised and dominated by procedures. This phenomenon of increasing complexity of procedures in ADR has been identified by ADR specialists in the US and some responsibility has been

²⁸ Chapter 2 para. 3.2.2

²⁹ Flood J. and Caiger A. (1993) op cit. See also chapter 2 para. 3.2.2

attached to lawyers involved in ADR.³⁰

It is the belief of many of the respondent that less money will be spent on legal advisors if ADR is used.³¹ The control by or expense of legal advisors is in the hands of the construction industry itself. It is for contractors to decide how much input the legal advisor has in the new procedures. The results indicate that, potentially, there may be a relatively high level of legal advisor involvement. If the "No" group are committed to using legal advisors in all the ADR procedures and the "Yes" group are neutral, there is a strong possibility that the "Yes" group will not wish to enter an ADR procedure legally unrepresented. This contention is supported by the data from the follow-up interviews. There are differences between groups as to the perceived need for legal advisors in ADR procedures. These differences will influence the choice of whether to use legal advisors and the resulting role they have in the development of ADR. It is possible, if legal advisors do not see a role for themselves, that they may not recommend using ADR. If legal advisors do perceive that they have a contribution or that they can dominate and control the new procedures, they will influence its use.

4.3 Legal advisors perceptions of their role in ADR.

The legal interviewees have mixed views on the role of the legal advisors in ADR. Many of the interviewees see a role for legal advisors, but this function varied. Several interviewees had trained as mediators already and had experienced acting as third party neutrals. Some legal advisors believe that their role will be an active involvement in the ADR procedures, giving presentations when necessary. Others see the legal advisor's role as purely consultative, advising as to the strengths and weaknesses of a dispute in the early stages, which will enable the parties to go into the ADR with their objectives clearly decided. However, most legal advisors believe that they do have an important advisory

³⁰ Hitchey J.W. (1994) Do We Need Special ADR Rules for Complex Construction Cases? International Multidisciplinary Conference on Dispute Avoidance and Resolution in the Construction Industry.

House L.P and Corgan B.G. (1994) Do We Need Special ADR Rules for Complex Construction Cases? International Multidisciplinary Conference on Dispute Avoidance and Resolution in the Construction Industry.

³¹ Chapter 4 para. 1.2.2.2

part to play in ADR. As a solicitor who has participated actively in mediations confirmed:

"Definitely a role to play because clients quite often don't understand their own case and part of my job is explaining to my client what his case is. Clarifying the case. I think to go into an ADR that is going to work, you have got to understand your own case and to know what your objectives are in the clearest possible way. I can imagine the horrible mess that some of my clients would get into if they went into an ADR without the benefit of that sort of advice. They would not be able to express themselves. I do a lot of work for sub-contractors and small businesses often have a limited understanding of their own real position."

Other interviewees are adamant that legal advisors should be present, in order to ensure that their clients do not experience difficulties or make settlements which are highly disadvantageous:

"On one of the occasions, the mediator said: you have to prove XYZ and I'm very sceptical about second hand reporting. You would want to be there in the flesh. And you would also want to advise your client throughout the mediation: 'Don't do this or we don't advise you to do this because of the consequences'."

Concern is felt by some legal advisors that clients would not have the skills necessary to participate effectively in ADR and this is particularly so for clients from smaller organisations whom, it was felt, are able to hide behind their legal advisors in the formal systems:

"I suppose to the extent that some of the bigger companies particularly are quite used to round table negotiation when a dispute arises between an architect or quantity surveyor. Therefore, this is quite a similar and familiar process but on the other hand some might find it intimidating, because, if you are involved in litigation or arbitration, you hide behind the lawyer. The lawyer writes the difficult letters, drafts them for you, takes up the adversarial position, if that is appropriate. Whereas, if you are in a mediation, you are

face to face and you are yourself having to talk to the mediator and I wonder whether in the event they will find it less intimidating."

The results indicate that legal advisors are likely to be in attendance if ADR develops and this will be at the invitation of their clients. This involvement may, eventually, influence the new procedures in the way that arbitration developed. One solicitor who had experienced a mediation abroad felt that to involve lawyers in the actual mediation process would result in it becoming a mini-arbitration. S/he explained her/his experiences with the opposition lawyer who used the presentation time to present the facts and legal issues and used precedent as in a court. The view of several of the legal advisors is that the success of ADR relies on the abilities of the mediator to control the lawyers and to organise the procedures. As one solicitor who had experienced several mediations and is enthusiastic about the process stated:

"I feel quite strongly that the mediator has got to call the shots, He's got to say how it's set up and how it happens and he's got to stick to it and not let the lawyers railroad it. That is why the mediator has got to be such a good dealer with people, forceful and be the sort of character that generates that sort of feeling."

5 Analysis of legal advisors role in ADR.

The survey data and follow up interviews suggest that, despite the fact most of the respondents will resolve disputes without legal advisors, there is evidence that legal advice is sought when the strengths and weaknesses of a dispute need to be assessed, when the parties are entrenched in their positions and when there is an unresolved legal issue. It is likely that in these circumstances, legal advisors will influence the choice of ADR.

The legal interviews reveal that legal advisors are of the opinion, contrary to the view of the construction industry, that it is the clients who are adversarial and, by the time legal advisors are consulted the parties are polarised in their arguments and a conciliatory approach is not feasible for a number of reasons: their clients are demanding that a forceful line is adopted by utilising either litigation or arbitration, the legal advisor does not believe that a conciliatory ADR procedure will be productive or, in main contractor

and sub/specialist contractor disputes, the only effective approach is the formal dispute resolution procedures, which will force the main contractor to take the dispute seriously. The perception of the respondents to the postal survey is that legal advisors do not recommend ADR and the legal interviewees corroborate this view, as they will not recommend it, when consulted by their clients, if they perceive that the parties are entrenched in their positions.

The legal interviewees are not antagonistic towards ADR, but there is an acknowledgment that the adversarial approach has its place in dispute resolution. The experience of most legal interviewees is that, in disputes involving sub/specialist contractors and main contractors ADR is often not appropriate. This is particularly so where the main contractor is delaying settlement or refusing to accept the seriousness of the sub/specialist's case. In these circumstances, the formal systems are preferred. There is some agreement in the legal interviews that litigation and arbitration are more suitable for the larger financial sizes of dispute. It is also the view of several legal advisors that ADR is not such a cheap dispute resolution option, which is a different perception from that of the survey respondents.

The legal interviews took place before the Housing Grants, Construction and Regeneration Act 1996 had been enacted. This is considered in detail in chapter 2.³² The legal advisors, generally, perceive that there may be a limited role for adjudication, in particular, for disputes involving failure to pay by main contractors and sub/specialists. Concern was expressed about the quality of adjudicators and the speed with which the decision has to be made. Generally, legal advisors do not consider that adjudication is appropriate for financially large disputes or complex matters. The Act makes adjudication a statutory right for all parties to a construction contract.³³ The decision is binding until practical completion. It is likely that legal advisors for sub/specialists will recommend adjudication in small disputes between main contractors and sub/specialists, where the main contractor is seeking to delay payment.

³² Chapter 2 para. 4.3

³³ The Act has not been implemented at the time of writing.

The survey reveals that the respondents are strongly in favour of using legal advisors in the formal procedures, but that their involvement in the ADR procedures depends on whether they will consider resolving a construction dispute without legal advice or not. The respondents who will not consider resolving disputes without legal advisors are in agreement that they should be used in most of the ADR procedures. The follow-up interviews suggest, that if one party intends to use a legal advisor, this will force the hand of the other side. Therefore, it is concluded that legal advisors will be actively involved in ADR and, thus, its potential development.

Legal advisors do perceive that they have a role in ADR, but the legal interviewees are not in agreement as to the extent of that involvement. Their interest may not be beneficial if it follows the same path as arbitration. The third party neutral has an important part to play in the format of ADR procedures, but arbitrators were unable to prevent the "juridification"³⁴ of arbitration by the legal profession and the inevitable question raised is about the identity of the ADR professional. The proponents of ADR claim that the parties have control over ADR,³⁵ but this may be relinquished if the legal advisors are involved.

³⁴ Flood J. and Caiger A. (1993) *op cit*

³⁵ Chapter 2 paras. 5-5.1

CHAPTER 8

DISCUSSION CHAPTER

The aim of this chapter is to examine the major themes addressed by the entire research. One objective is to highlight any differences in the perceptions of the sub-groups investigated, in order to assess the implications that the different perspectives present for the potential contribution of ADR to the construction industry. Where germane, reference is made to the contractors who reported using ADR. The numbers of contractors who have used ADR is small and, therefore, any discussion of these results are included to illustrate or support the main findings of the research. The aim of this chapter is to consider and evaluate the major issues and points of argument revealed by the research.

Section one will review the hypotheses which have been tested in the thesis and determine whether they have been supported or not and to what degree any significant differences between groups may impact on the contribution that ADR can make to the dispute resolution needs of the construction industry. This section is sub-divided into the hypotheses of the study. The second section explores the factors which have been identified as potentially affecting the use of ADR by contractors. Any differences between groups are examined in order to assess their influence on the choice of ADR by contractors.

1 Section one: Hypotheses

1.1 Hypothesis one: *The development of ADR is due to dissatisfaction with the formal systems of dispute resolution.*

The first hypothesis of the thesis is that the development of ADR is due to dissatisfaction with the formal systems of dispute resolution, namely arbitration and litigation. This was tested by a postal survey of main and sub/specialist contractors and by in-depth, follow-up interviews. The questionnaire tested the sample's response to attitude statements about the formal systems of dispute resolution and ADR.

The postal survey confirms that main contractors and sub/specialist contractors are

dissatisfied with some features of litigation and arbitration. This dissatisfaction centres around the issues of cost, time and their adversarial procedures, which are perceived as confrontational and threatening. Further, there is a significant level of agreement from the respondents that there is a need to move away from the adversarial approach.

Inferential statistics indicate that the respondents, who are classified by "contractor type" and "turnover size", do not differ in their attitudes to the formal system. Any statistical differences which exist are ones in level of agreement or disagreement with the attitude statements rather than differences in opinion. Thus, groups in the largest turnover category (£50 million and over) agree significantly more than the other turnover groups that arbitration is a more threatening procedure than ADR. Groups in the smallest turnover category (£6 million and under) agree significantly more than the other turnover groups that litigation costs too much. Sub/specialist contractors agree significantly more than main contractors with the statement that the construction industry needs a quick resolution of disputes. These differences are unlikely to affect adversely the choice of ADR but may affect the choice of either litigation or arbitration. For example, contractors with a turnover of £6 million and under are less likely to choose litigation than other groups.

The findings of the survey reveal that many positive perceptions about the advantages of ADR are held by main contractors and sub/specialist contractors. There are commonly held perceptions that ADR is cheaper, quicker and less confrontational and threatening than the formal systems. However, it is noted that when ADR is compared to the formal systems, there are high levels of agreement that it has qualities that arbitration and litigation lack but, when more technical aspects of ADR were tested, there are lower levels of agreement or disagreement. The results of the attitude statements suggest that there is a substantial lack of knowledge about some attributes of ADR; such as the proposition that it is good for multiple claims, that it is flexible or that its settlement rate is high. Some of this lack of knowledge is probably due, in part, to the lack of experience of ADR by contractors and their legal advisors. This was confirmed by the comments made by respondents and the follow-up interviewees. Further, the comments which were made suggest that the positive perceptions about ADR, which are held by

contractors, are most likely to be caused by default because of the dissatisfaction with certain aspects of the formal systems. As a consequence, contractors perceive ADR to have positive attributes, such as speed, cheapness and a consensual approach, which the formal systems do not have.

Statistical tests reveal the different groups, of "contractor type" and "turnover size", do not differ on their perceptions about ADR. Any significant differences are of levels of agreement or disagreement and not different perceptions. Thus, main contractors significantly agree more than sub/specialists that ADR saves management time, is confidential and is cheaper than the formal systems of dispute resolution. The results of the survey did indicate that main contractors are more confident than sub/specialist contractors about the positive attributes of ADR. The data from the follow-up interviews suggest that the confidence main contractors have in ADR is the result of having available better resources, in both management time and financial costs, to educate themselves. These differences of levels of agreement are not likely to affect the choice of ADR adversely but may in fact be more influential in the decision not to use the formal systems.¹

1.1.1 Using ADR

The survey results indicate that 70% of the respondents agree that they would consider using ADR to resolve construction disputes. The predominant reasons given by contractors for considering using ADR are its costs and speed compared with either litigation or arbitration, which further supports the first hypothesis and the inference that many of the positive perceptions about ADR are caused almost by default. Inferential statistics yielded significant differences between the groups tested. Main contractors are more likely to say that they will use ADR than sub/specialist contractors. This supports the proposition, made earlier that main contractors are more confident about ADR than sub/specialists. Further, there is a relationship between the category of turnover size and using ADR. Organisations with a turnover of over £6 million are more likely to say they will consider using ADR than those with a turnover of £6 million and under.

¹ Chapter 4 section 2 paras. 2.3.1-2.44

When the profile of contractors who have used ADR is examined, the above proposition is supported as the results show that, of the nine users, six are main contractors and three are sub/specialists. Further analysis reveals that 8 of these contractors come from the turnover groups of over £6 million and only one from the turnover group of £6 million and under. (See figure 46)

1.1.2 Contractors are less dissatisfied with arbitration.

Although the results of the postal survey expose dissatisfaction with the formal systems of dispute resolution, it is noted that there is more dissatisfaction with litigation than with arbitration. Contractors do perceive arbitration to be too costly, slower than ADR and to be confrontational and threatening but the results of the survey indicate that the respondents do not significantly agree or disagree with the statement that arbitration is a satisfactory procedure for resolving construction disputes. *Inferential statistical tests* did not show that "contractors type" nor "turnover size" significantly differ in this perception. By comparison with this result for arbitration, all groups disagree significantly with the statement that litigation is a satisfactory procedure and very high levels of agreement were recorded for the statement that litigation costs too much.

The issues of costs, delay and the adversarial approach have been addressed by the Arbitration Act 1996.² However, some commentators in the construction industry are not convinced that contractors will be persuaded to choose arbitration and surmise that the parties to construction disputes will continue to strike out arbitration clauses.³ There is a belief that, because the Act preserves the right of the parties to agree the procedures,⁴ some legal advisors may insist on a court room style.⁵

² Chapter 2 para. 3.3

³ See chapter 2 para. 3.3.1
Bingham T. (1996) The New Arbitration Bill (1996) Arbitration February
Wallace I. D. (1997) op cit

⁴ Arbitration Act 1996 section 1(b)

⁵ Critchlow J. (1996) op cit

Doubts have been expressed that arbitrators have the skills and expertise necessary to cope with the new powers vested in them by the Act or the ability to adopt such flexible approaches as the inquisitorial style.⁶ The potential abandonment of procedural and evidential safeguards has been described as particularly dangerous for construction disputes, which will, it is claimed, lead to more appeals and claims and result in legal advisors recommending that contracts have pre-defined procedures.

However, if the issues of the cost, speed and adversarial approach of arbitration are perceived by contractors to be eradicated or minimized by the 1996 Act, contractors may continue to elect to use arbitration.⁷ Contractors are neutral to the statement that arbitration is satisfactory and this perception may be pivotal in the development of ADR in the future. If the provisions of the Act results in a resolution procedure which contractors perceive will be cheaper and prevent delay,⁸ it will influence some contractors' choice of dispute procedure and this may be at the expense of the potential development of ADR.

Despite evidence from the survey results that contractors hold significantly positive perceptions about ADR and that a majority will consider using ADR, the survey confirms that ADR is not being extensively used by main contractors and sub/specialist contractors,⁹ which supports earlier research to that effect.¹⁰ Only 3.9% of the respondents reported that they had used ADR. One probable factor, which is considered below, is that contractors hold negative perceptions about ADR.¹¹ The survey and follow-up interviews uncovered other probable causes for the lack of experimentation with ADR.

⁶ Bingham T. (1996) op cit, Morris P. (1996), Priestly R. (1996) op cit

⁷ This point is particularly significant when the results of the respondents views about the suitability of different dispute resolution procedures to different financial sizes of dispute are considered. Chapter 6 paras. 1.4.3.1-1.4.4

⁸ Arbitration Act 1996 sections 1(a) and 33(1)(b)

⁹ Chapter 4 section 3 para. 3.2

¹⁰ Fenn P. and Gould N. (1994) op cit

¹¹ Chapter 8 para. 1.2

These involve the perceptions held by contractors as to the inappropriateness of ADR for all types of construction dispute and the perceived suitability of different dispute procedures to resolve different financial sizes of dispute.¹²

1.1.3 Summary on the first hypothesis.

The influence of the negative perceptions and the perceived appropriateness of ADR on contractors when they are making their choice about dispute resolution procedures is considered below. It is noted in the discussion on the first hypothesis because, although the data provides evidence to support the first hypothesis: The development of the ADR, between main contractor and sub/specialist contractor, is due to dissatisfaction with the formal systems of dispute resolution, the survey shows that ADR is not frequently used and, therefore, is not developing in the sense of frequency of use. The findings show that there is dissatisfaction with the formal systems and that contractors do hold positive perceptions about ADR. The comments by the respondents and the interviewees suggest that ADR is invested in the attributes which the formal systems is lacking in: speed, cheapness and a non-adversarial approach. Thus, ADR is developing in the sense that contractors have a growing awareness of it and hold positive perceptions about its advantages over the formal systems but is not developing noticeable by usage. Finally, the survey data discloses that contractors are irresolute about how satisfactory arbitration is. This is likely to prevent the growth of ADR if the 1996 Arbitration Act has effectively addressed the perceived problems.

1.2 Second hypothesis and third hypothesis:

**Negative perceptions are held about ADR by main and sub/specialist contractors.
Negative perceptions are influencing the choice of ADR.**

The data from the postal survey and interviews confirm that contractors in construction are dissatisfied with many features of the formal systems and hold positive perceptions about the advantages of ADR. Despite these perceptions, the survey confirms also that

¹² Chapter 6 section 1 para 1.4-1.4.4

ADR is not frequently used. This section explores the hypotheses that contractors hold negative perceptions and that these perceptions are influencing the choice of ADR by contractors.

The postal survey confirms the second hypothesis, in part. Of the four negative perceptions that had been identified in the early part of the research, only two are found to be held significantly by contractors. The respondents disagree significantly with the statement that **using ADR is a sign of weakness** and do not agree or disagree significantly that **ADR reveals too much of one's case to the opposition**. Statistical tests show that there are no differences in attitude for "contractor type" or "turnover size". Thus, these negative perceptions are not held generally by contractors. The survey and follow-up interviews support the view that these perceptions are not influencing negatively the choice of ADR by contractors. This issue is considered further in the next section when the influence of legal advisors in the choice of dispute resolution is discussed.¹³

One argument raised by the proponents of ADR is that if using ADR is perceived as a weakness in one's case this can be overcome by inserting ADR clauses into contracts. The results indicate contractors do not hold generally the perception that using ADR is a sign of weakness. *The postal survey tested contractors' perceptions about inserting ADR clauses into construction contracts.* Contractors agree with the statements about putting mediation, conciliation and adjudication clauses into construction contracts but are neutral about Dispute Review Board and Executive Tribunal clauses. Statistical tests did not show that any group significantly differ. The results of the postal survey and follow-up interviews indicate that the resistance to using ADR is more likely to be due to other factors rather than the perception that using it is a sign of weakness.¹⁴ It is, therefore, likely that the proponents of ADR, when they promote the use of ADR clauses, are not addressing the most influential factors which are effecting the choice of ADR by contractors. Research in the US construction industry has shown that the success rate for settling construction disputes using non-binding ADR procedures were higher when the

¹³ Chapter 8. para 1.3.2

¹⁴ See below.

parties agreed to ADR after a dispute had arisen than when they were required to use ADR either through a court order or a provision in the contract.¹⁵ The results of the postal survey show that only two of the respondents who had used ADR (out of nine) did so because it was a requirement of the contract and in both cases the procedure used was adjudication, where a third party neutral makes a decision rather than the parties reaching a facilitated agreed settlement. As yet, it is unlikely that ADR is being used or reported in sufficient numbers to assess the influence of mandatory ADR, through court or contract requirement.

The data from the postal survey have revealed that contractors are in significant agreement with the statements that **the weakness of ADR is that it is non-binding and ADR can be used to create delay**. When the survey comments and follow-up interviews are analysed, they reveal that *the problem of delay is intrinsically linked to the perception that ADR is non-binding*. If the parties do not reach a settlement after using ADR, or if one of the parties refuses to accept the decision (if the ADR procedure has a neutral person giving a decision) then, *the perception held by contractors is that the parties must continue with the formal systems of dispute resolution, which results in added time and costs*. This perception is held also by legal advisors. Many of the legal interviewees had little experience of using ADR in practice but there is an awareness that, if one party wishes to delay settlement, it would be possible to agree to some form of ADR, refuse to settle if the procedure were non-binding and then force the other party to continue with either litigation or arbitration.

The statistical tests show that there is a significant difference in attitude between main contractors and sub/specialists in the perception that **ADR can be used to create delay**. Sub/specialist contractors agree significantly that ADR can be used to create delay, whereas main contractors do not agree or disagree significantly. Further, there is a trend for respondents in the largest turnover category (£50 million and over) to agree this significantly more than other turnover categories. Sub/specialist contractors, who are in dispute with main contractors, are unlikely to want to use any type of ADR procedure if it

¹⁵ Stipanowich T. and Henderson D. (1992) op cit

is likely to create even more delay in settling their claims. Most legal advisors attested to the fact that in disputes between main contractors and sub/specialists the formal systems are the most obvious choice, because frequently these disputes are about the main contractor trying to create delay and failing to take the sub contractor's claims seriously. The legal interviews provide further evidence that the legal advisors who represent main contractors, are involved in manipulating the formal systems of dispute resolution in order to create delay for their clients. Further, there is evidence, also from the legal interviews, that legal advisors with more experience of ADR believe that it can assist in delay.¹⁶

Statistical tests show that there is no difference in attitude for respondents categorised by "contractor type" or "turnover size" with the statement that **the weakness of ADR is that it is non-binding**. Thus contractors agree, generally, with this statement. This is corroborated by the legal advisor interviews, which provide evidence that this perception is an extremely influential factor in their clients' decision not to use ADR. Legal advisors report that their clients are disinclined to use ADR when they discover that it is non-binding. The survey respondents are of the opinion that ADR has to given "*teeth*", by making it binding in order to make it a viable option. Some legal interviewees also believe that this characteristic plays into the hands of the party who wishes to delay the procedure.

Respondents who are experienced in ADR,¹⁷ and some legal advisors, are of the opinion that this problem is overcome by drawing up a contract which reflects the outcome of any settlement reached through an ADR procedure. Despite this conviction, the evidence from the survey and the follow-up interviews demonstrates that a significant number of the respondents believe that the advantages of ADR are outweighed by the perceived problem that if the settlement is not binding and one of the parties does not accept it, this

¹⁶ The influence of legal advisors in ADR is considered in detail below. See chapter 8 para. 1.3.2

¹⁷ As reported in chapter 4 section 3 para. 3.2, only 9 respondents had used ADR. This number is too small to make any statistical analysis but their views are reported as illustrative of contractors who have used ADR. Some of these respondents were interviewed and they felt that the perception that the weakness of ADR is that it is non-binding is an "unsophisticated one".

results in the parties continuing with either litigation or arbitration and, consequently, in added costs and delay. The legal interviews support the finding that contractors are influenced by the non-binding nature of ADR. This, together with the already existing problem of delay in settling disputes between main contractors and sub/specialists,¹⁸ is making ADR an unattractive option for many of their clients and is a major factor influencing the choice of ADR by contractors. Many of the legal advisors interviewed believe this is particularly so for disputes between main contractors and sub/specialists because the desire of main contractors to create delay is endemic in the construction industry in their experience.¹⁹

The survey results and the interviews suggest that contractors are less likely to choose a non-binding form of ADR. This view is corroborated by the experience and the views of the legal interviewees. Further, sub/specialist contractors are particularly concerned with the issue of delay and the need for a quick resolution of disputes. The data illustrate that sub/specialist agree significantly more than main contractors that ADR can be used to create delay, which means they are unlikely to consider non-binding ADR procedures in disputes with main contractors.

1.2.1 Binding Adjudication.

One ADR procedure which has the advantage of being binding until the end of a contract or project is adjudication. The survey sample were asked their level of agreement with the statement that adjudication is the most suitable procedure for construction disputes. The respondents are in agreement with this. However, it is noted that there is a weak level of significant agreement.²⁰ *Statistical tests show that there is no difference between "contractor type" or "turnover size" but there is a trend for an interaction between "contractor type" by "turnover size".* The difference lies between main contractors with a turnover of £50 million and over, who disagree with the statement that adjudication is the

¹⁸ Chapter 2 paras. 4.2.1-4.2.2

¹⁹ See the discussion below. Chapter 8 para. 1.3.2 and chapter 7 para. 3.2 more generally.

²⁰ Chapter 6 paras. 3-3.2

most suitable ADR procedure for the construction industry, whereas all the other groups are in agreement. This group is least likely to choose adjudication as a process to resolve their disputes. However, this potential reluctance has been countered by the Housing Grants, Construction and Regeneration Act 1996, which under section 108 has made adjudication a statutory right for construction contracts.²¹ The parties in a construction contract²² may use arbitration, litigation or ADR but, if one party wishes to use adjudication the other parties reluctance will not be able to prevent the procedure going ahead. The preference contractors have for adjudication is supported by the experience of the respondents who reported using ADR. (See figure 68) Adjudication has been used 12 times, out of an overall total of 21 occasions, which is more than any other ADR procedure.²³

At the time of the legal interviews, the legal advisors were unaware that adjudication was to be implemented as a statutory right. The legal interviews provided evidence that legal advisors have some reservations about the proposals for adjudication, which were, at that time, in the public domain. These were the recommendations of the Latham report.²⁴ However, many of the legal interviewees agree that there is a need for a quick and cheap dispute resolution procedure.

Many in the industry believe that adjudication is not suitable for complex disputes involving loss and expense, extension of time and liability for defects and it has been suggested that it may create problems for consultants providing confirmation that they should have indemnity until there has been a final legal determination.²⁵ Concerns have

²¹ Chapter 2 para. 4.3

²² Part II of the Act applies to any "construction contract" which is defined as any agreement for the carrying out of construction operations.

²³ The respondents have used mediation 5 times, conciliation once and an Executive tribunal once.

²⁴ Latham M. (1994) *op cit* Recommendations 26.1-26.5: Adjudication

²⁵ See chapter 2 para. 4.3.1.
Simms J. Construction Industry Law Letter September 1996 (Letter)

been expressed about the stringent time scales by which the adjudicator has to reach a decision and some commentators believe the time scale is too brief for an adequate appraisal of complicated construction disputes.²⁶ It has been suggested that, in practice, adjudication will be more suitable to the question of entitlement of payment than defects.²⁷ Several of the legal interviewees substantiated the view that adjudication is not appropriate for complex, technical disputes. Thus it is likely that adjudication will not be recommended by some legal advisors if the construction dispute is complex. Comments made by the survey respondents support the view that ADR more generally may not be suitable for complex disputes. There is some agreement from the legal advisors of sub/specialists who were interviewed that it would be a suitable procedure for disputes between main contractor and sub/specialists, particularly where there it is an issue of non-payment.

Making adjudication a statutory right may help to resolve some of the worst manipulation of the formal dispute resolution procedures by forcing a quick dispute resolution procedure on the industry. The research has shown that respondents consider adjudication the most suitable ADR procedure for the construction industry. The legal advisor interviews provide support for the view that it is suitable for main contractor and sub/specialist disputes over payment issues but for other complex disputes, contractors and their advisors are likely to perceive it to be *inappropriate*.²⁸

The possibility that contractors will continue to give their allegiance to arbitration is more persuasive as the results of the survey confirm that contractors do hold two negative perceptions; **The weakness of ADR is that it is non-binding and ADR can be used to create delay.** Arbitration is a tried and tested procedure and it is binding. Although the

Editor of Construction Law Letter (1997) vol 8 issue 1.

²⁶ Kent L. (1996) op cit, Helps D. (1996) op cit

²⁷ Construction Industry Law Letter (1996) June

²⁸ The likely involvement and influence of legal advisors in adjudication is considered below. Chapter 8 para 1.3.3

evidence of the survey and the interviews indicate that there is disquiet about the manipulation of arbitration in order to create delay,²⁹ if the 1996 Arbitration Act curtails this practice, it is likely that contractors will continue to choose it in preference to adjudication, which is an untried, untested procedure in its present, statutory form. This view is supported when the results show that contractors do not agree significantly that arbitration is unsatisfactory.

1.2.2 Summary on the third and fourth hypotheses.

The findings of the survey, follow-up interviews and the legal interviews show that two negative perceptions are influencing the choice of ADR by contractors. Sub/specialist contractors believe that ADR can be used to create delay and contractors are influenced by the fact that ADR is non-binding. Conciliation and mediation are non-binding and are thus less likely to be selected by contractors than adjudication which, when implemented, has the attraction of being binding. This may, indeed, be an incentive to sub/specialist contractors who, it is noted, are particularly concerned with delay in payment. There is criticism of the present government proposals for adjudication as the Government Scheme has defined it, thus far, and the commentators on statutory adjudication have suggested it may have a limited application to non-complex disputes regarding payment, which is a view supported by the legal interviewees. If the reforms of arbitration under the Arbitration Act 1996 are perceived by contractors to be effective, then this may make it a more attractive option than adjudication for some contractors, particularly for complex disputes, because contractors, generally, do not believe that arbitration is an unsatisfactory procedure and adjudication is an untried procedure in its present form.

1.3 Hypothesis four: Legal advisors in the construction industry are influencing the development of ADR.

The fourth hypothesis is that legal advisors are influencing the use of ADR by contractors. This hypothesis was tested by in-depth interviews with legal advisors to the construction industry and in the postal survey. It is based on the premise that most people settle disputes with reference to the probable outcome of going to court and that many

²⁹ Chapter 4 para. 1.1.5

contractors are not able to assess the likely outcome of going to court without the assistance of legal advisors.³⁰

1.3.1 Using legal advisors in construction disputes.

The data from the survey indicate that 70% of the respondents agree that they would consider settling a construction dispute without advice from legal advisors and the major factor influencing this decision is the costs incurred. Respondents are concerned about the standard of advice available and there is a strongly held perception that contractors "know their own business." The survey data and the follow-up interviews demonstrate that, although many respondents will and do resolve disputes without recourse to legal advice, there are defined circumstances when they do seek advice. Thus, when the parties need to know the strengths and weaknesses of their case, when the parties become entrenched or polarised in their arguments and when there is a legal issue in contention, contractors will obtain legal guidance. The legal interviews confirm that many disputes are not referred to legal advisors but they also support the findings of the survey that their advice is sought in the circumstances defined above. The survey and interview data indicate that when legal advisors are consulted in the prescribed circumstances, their attitudes towards ADR will be influential in the final decision taken by contractors about which dispute resolution procedure to use.

The survey results shows that there is considerable dissatisfaction with the formal systems and that over 80% of the respondents agree that there is a need to move away from the adversarial approach. This strongly held perception was received with scepticism by the legal advisors interviewed. In their experience, *it is the clients who are antagonistic and* who demand that an adversarial approach is used. Further, the legal interviews reveal that the experience of the legal advisors is that, by the time they are approached their clients are too entrenched in their arguments and unwilling to compromise and, therefore, ADR is often not appropriate at this stage, particularly the conciliatory procedures such as mediation and conciliation.

³⁰ Chapter 2 para. 7

Although the legal advisors accept, generally, some of the criticisms levelled at both arbitration and litigation, they hold the belief that both formal systems play a vital part in dispute resolution in the construction industry. In particular, the interviewees are of the opinion that most disputes between main contractors and sub/specialists require the force of the formal systems in order to compel main contractors to take sub/specialist contractors' claims seriously. Many of the legal advisors who represent sub/specialists are of the opinion that they would not recommend ADR for disputes where the main contractor is refusing to acknowledge claims made by the sub/specialist contractor or merely refusing to settle a claim in order to create a delay in payment. It is highly probable that legal advisors, who represent sub/specialists, will not recommend using conciliatory forms of ADR, particularly when the dispute involves the main contractor delaying payment. The legal interviewees are of the opinion that ADR may be of use where there is a genuine misunderstanding and a need for a continuing relationship but in most disputes between main contractor and sub/specialists, the experience of the majority of the legal advisors is that the formal systems are more likely to be preferred both by themselves and their clients.

However, statutory adjudication, when the Act comes into force, may be recommended by advisors as an appropriate ADR procedure, where there is evidence that one of the parties is trying to delay or there is a necessity for a quick resolution for one party. As noted above legal advisors for sub/specialists contractors perceive that adjudication may be useful, where the main contractor is delaying the dispute.

The survey reveals that contractors hold the perception that ADR is cheaper than the formal systems but several legal advisors believe that ADR procedures are not particularly cheap. Legal interviewees identified mediation as being expensive because good mediators are likely to charge the same as good arbitrators. The costs of employing the best ADR neutrals can escalate when payment is made for the reading time of documents. Further costs will be incurred if the parties want their legal advisors to be in attendance at the ADR process. The results show that it is likely that legal advisors will be used in

many ADR procedures.³¹ The survey results show that contractors significantly agree that less money is spent on lawyers when using ADR. A large part of the costs of ADR will be made up of the legal advisors' bill, which is likely to be substantial.³² The evidence from the legal interviews suggest that the costs of ADR may be more than contractors perceive. The survey comments and interview data indicate that contractors are extremely concerned about the costs of the formal systems and that ADR is a better alternative because they believe that it is cheaper. If legal advisors believe that ADR is relatively expensive it will be an influential factor for contractors to consider when they consult their advisors. It had been noted in the literature search that ADR can result in added costs, if it fails and the parties have to continue with other dispute resolution procedures.³³ However, recent literature indicates that there is an increasing awareness that the ADR procedures, themselves, may not be as cheap as contractors perceive them to be.³⁴ If this becomes a more generally held perception by legal advisors, it will influence the advice that they give to their clients.

1.3.2 Legal advisors attitudes on negative perceptions.

The legal interviewees support the findings that contractors are influenced by two negative perceptions: that ADR can be used to create delay and that its weakness is that it is non-binding.³⁵ However, although the survey reveals that the respondents do not hold, generally, the perception that using ADR reveals the parties' case to the opposition, the legal interviews did disclose that some legal advisors, particularly those who have had experience of ADR, believe that it can be utilised to discover the weaknesses of their

³¹ See below chapter 8 para. 1.3.3

³² Chapter 7 para 1.2.1

³³ Newman P. Alternative Dispute Resolution - A Viable Alternative to Arbitration and Litigation 1993 Construction Law (1993) Vol 4 Issue 2 June/July.
Naughton P. (1990) op cit

³⁴ Miller J. (1996) Alternative Dispute Resolution Common Problems and Misconceptions August Arbitration 186
Winter J. (1996) The cost of Arbitration in Intellectual Property Arbitration November

³⁵ Chapter 7 paras 3-3.1.2

clients and their opponents case.³⁶ It is noted that this perception has been discounted as having little credence in the US in a major survey of legal advisors to the US construction industry.³⁷ Nevertheless, it is possible that this negative perception will become held more commonly by legal advisors here. This is a particularly disturbing phenomenon, as it was alleged by a QC, who was interviewed, that ADR specialists discussed how to use it tactically in a seminar to promote ADR which the interviewee had attended.

1.3.3 Using legal advisors in ADR procedures

The survey tested contractors' opinions on the involvement of legal advisors in different dispute resolution procedures. The respondents were asked to assess how much they agree or disagree with using legal advisors in different dispute resolution procedures. The results show that contractors are strongly in favour of using legal advisors in litigation and arbitration. Any statistical differences which are found for different groups are only in levels of agreement.

The results of the survey indicate that there are differences between type of contractor and size of turnover category on using legal advisors in two ADR procedures. There is a significant difference of opinion between main contractors and sub-contractor in the middle turnover category (Over £6 million and under £50 million) on whether they agree with using legal advisors in the DRB and the Executive Tribunal. Main contractors in this size of turnover disagree with using legal advisors in both these ADR procedures, whereas sub-contractors in the same turnover category agree with their use. This turnover group of main contractors have a difference of opinion from all other groups; they are less likely to use legal advisors in a DRB and an Executive Tribunal.³⁸ However, the research indicates that if the other party insists on using a legal advisor in ADR then the other

³⁶ Chapter 7 para. 3.1.3

³⁷ Stipanowich T. and Henderson D. (1992) op cit

³⁸ See discussion on the suitability of the Executive Tribunal and the DRB for financial sizes of disputes, where it is suggested these two ADR procedures are less likely to be selected by contractors. Chapter 6 paras. 1.4.3.3-1.4.4

party is likely to also.³⁹

The statistical tests reveal that there are further differences in the survey population about using legal advisors in different dispute resolution procedures, which are likely to affect their potential influence and role in ADR. This difference depends on whether the respondent would consider resolving a construction dispute without legal advice. The respondents, who would not consider resolving disputes without legal advice, ("No" group) are in agreement with the statement about using legal advisors in all the dispute resolution procedures except for conciliation and negotiation, where they are neutral. The group, who would consider resolving disputes without legal advisors, ("Yes" group), disagree with using legal advisors in conciliation, mediation and negotiation. This group is, however, neutral about using legal advisors in adjudication, a DRB and an Executive Tribunal and they agree with using legal advisors in litigation and arbitration.

It is likely that if both parties to a dispute are from the "Yes" group, they will not use legal advisors for negotiation, mediation and conciliation, when in dispute with each other. In the follow-up interviews, contractors asserted that, if the other party to the dispute is represented in a dispute resolution procedure, this would influence their choice as to whether to use a legal advisor. Therefore, if one party to a dispute engages legal representation, the other party, even if they are from the "Yes" group, will use legal advisors also. Thus legal advisors are likely to be present in the future in many ADR procedures and, therefore, are likely to influence both the choice of dispute resolution procedures and the format of the procedures.

1.3.4 Legal interviewees perception of their role in ADR.

The legal interviewees do perceive that they have a role in ADR but there is no consensus as to the extent of that role. Many legal interviewees believe that they should be present to protect their clients interests on any settlement offers, even if it is only in the background. Other legal advisors perceive that they will take a more pro-active role, particularly in giving presentations of their clients' argument and being actively involved

³⁹ Chapter 7 paras. 4-4.2.1

in the settlement process. For many legal advisors, a more active role is envisaged for the more formal ADR procedures such as adjudication, Executive Tribunals and the DRB.

It is noted that the survey population are neutral about using legal advisors in adjudication⁴⁰ and, further, the "Yes" group are also neutral about using a legal advisor in adjudication. Adjudication is the most similar of all the ADR procedures to arbitration and, further, the third party neutral makes a decision, which is binding up to practical completion. If the decision is legally binding, it is likely that the parties will wish to have legal advice about the possible outcome of the procedure.

An examination of arbitration shows that its development was due to an increased involvement of the law to give the arbitral process "teeth", which resulted in increased statutory provision and an increased involvement of lawyers to interpret and argue the law.⁴¹ It is possible to draw a comparison to the early development of adjudication. Adjudication has similarly developed from an agreed contract clause to being given stature through legislation. The survey results suggest that it is likely that legal advisors will be used in the adjudication procedure, which was the experience of arbitration. It has been maintained that it was the involvement of the legal profession in arbitration which resulted in the adoption of *court room practices and the juridification* of the procedure.⁴² Some of the legal interviewees perceive that adjudication is a more formal form of ADR and suggest that it is an adversarial process.⁴³ Further, legal advisors who represent main contractors acknowledge that a major part of their practice is creating delay and commentators suggest they will discover methods of creating delay by manipulating the adjudication procedure and thus the consequence of the Act may be just adding another tier to the dispute resolution process in the construction industry, which may create further

⁴⁰ It is noted that the 95% confidence interval CI for this attitude statement was close to a significant level of agreement. Chapter 6 paras. 3-3.1

⁴¹ Chapter 2 paras. 2-2.3

⁴² Flood J. and Caiger A. (1993) *op cit*, Arthur H.W. (1984) *op cit*

⁴³ Chapter 7 para. 3.2.5

delay and expense.⁴⁴

The introduction of a statutory right to adjudication is likely to lead to an increase in its use, particularly as the respondents agree that it is the most suitable procedure for the construction industry. Further, the survey results indicate that legal advisors are likely to be involved in the procedure and the draft scheme for adjudication has not excluded the parties from legal representation.⁴⁵ This will result in adjudication being influenced by the legal advisors. The involvement of the legal profession in ADR may lead to the development of procedures which will stifle its development as was the experience of arbitration.

One objective of the reform of civil justice by the Woolf Report is for case management to deflect some cases from litigation towards ADR.⁴⁶ This is already encouraged by the courts through two Practice Directions.⁴⁷ First, barristers must complete a pre-trial check list which asks if ADR has been considered but as one barrister who was interviewed commented it is his duty to mention ADR but this does not require him to press it on his client. Second, judges may now invite the parties to begin ADR procedures or offer early neutral evaluation themselves. The barrister interviewees, who had trained as mediators, found that when a referral was made to them about mediation, the parties were more interested in a non-binding, early evaluation, of the dispute rather than a mediation process. The research indicates that contractors go for legal advice to find out the strengths and weakness of a case. If the parties to a dispute are given an early opportunity to see what the likely outcome of litigation is, by either a judge or a highly qualified barrister, this would be a useful tool in reaching a settlement.

⁴⁴ Minogue A. (1996) op cit, Brooker P. and Lavers A. (1994) op cit

⁴⁵ (1996) Making the Scheme for Construction Contracts (Consultation document issued by the DOE) B9.1 The adjudicator is not obliged, in setting dates of any meetings, to allow extra time for briefing representatives or ensuring their attendance. op cit

⁴⁶ Woolf Final Report (1996) op cit. See chapter 2 para. 3.1.3

⁴⁷ Practice Statement issued by the Commercial Court 10 December 1993.
Practice Statement issued by the Commercial Court 7 June 1996. See chapter 2 para. 5.2.2

1.3.5 Summary on the fourth hypothesis.

Legal advisors are not consulted for every dispute between contractors but the research identified certain circumstances when they will be used.⁴⁸ It is in these situations that legal advisors are likely to influence the choice of dispute resolution procedure. The legal advisor interviews reveal that the conciliatory types of procedures of mediation and conciliation are unlikely to be recommended by most legal advisors in these circumstances because of the adversarial approach adopted by their clients and because the formal systems are perceived to be more effective in forcing the parties to consider the dispute more seriously. Further, most legal advisors who represent sub/specialist contractors do not believe that ADR is appropriate when the main contractor is merely creating delay.

Adjudication, when finally implemented, may be used increasingly because it has the added advantage of being binding to the end of practical completion and the survey suggests that contractors perceive the procedure as the most suitable ADR procedure for construction disputes. However, there are potential limitations and problems with adjudication. Legal advisors and many commentators do not believe that the present proposals for adjudication are suitable for complex construction disputes. Commentators suggest that adjudication may become another tool to be manipulated by legal advisors at the request of their clients. The results also reveal that many contractors will insist on using legal advisors in adjudication, which is likely to lead to increasing legal involvement and influence in its development. The research indicates that contractors are ambivalent about whether arbitration is satisfactory and, therefore, if the 1996 Arbitration Act succeeds in improving the perceived problems of arbitration, it may be chosen by contractors in preference to adjudication.

Finally, contrary to the perceptions of contractors, some legal advisors are of the opinion that ADR is not cheap. The survey reveals that contractors are very concerned about the costs of the formal systems and believe that less money will be spent on lawyers if ADR is used. If legal advisors suggest that ADR is not as cheap as contractors believe it to be, it is likely that this will be a very influential factor in its choice by contractors.

⁴⁸ Chapter 7 para. 1.2.3

2 SECTION TWO

Members of the survey population were asked whether they thought ADR was appropriate for all types of construction dispute and to comment on their reasons for their opinion. The data were analysed in order to identify any further factors influencing the choice of ADR as a dispute resolution procedure. The literature and indicator interviews had implied that there is another possible determinant, the perception that the financial size of dispute is relevant in the choice of dispute resolution procedure; one objective of the survey was to test whether the respondents hold perceptions as to the suitability of ADR to different financial sizes of dispute.

2.1 Appropriateness of ADR to resolve construction disputes

The results of the survey showed that only 22.2% of the sample believe that ADR is appropriate for all types of construction disputes, 33.3% do not believe it is appropriate for all types construction disputes and 44.4% do not know. Statistical tests showed that no groups significantly differ from this opinion. The high percentage of respondents who do not know whether ADR is appropriate for all construction dispute suggests that there is a lack of knowledge about ADR.

When the comments and interviews were analysed, the data reveal that many respondents were unable to answer this question because of a lack of experience and knowledge of ADR. This supports *the proposition that contractors lack knowledge* about the more technical aspects of ADR and that many of their positive perceptions about ADR are due to dissatisfaction with certain features of the formal systems.⁴⁹ The data provided by the comments and follow-up interviews did not reveal any single factor which suggests that ADR is perceived as appropriate for resolving all construction disputes, nor any single factor that clearly leads to the conclusion that ADR is inappropriate to resolve all construction disputes. An analysis of the data indicates that contractors do perceive that ADR is inappropriate for some construction disputes. These perceptions are described as they illustrate the factors which may be taken into account by some contractors when selecting an appropriate dispute resolution procedures for their particular dispute.

⁴⁹ Chapter 8 section 1 para. 1.1

Contractors perceive that ADR is inappropriate for disputes where the parties have adopted entrenched positions and are not prepared to compromise or consider the other parties' position. This perception is supported by data from the legal advisor interviews as discussed above. In this situation, it is the opinion of many of the respondents and the legal advisors that the formal systems are more appropriate, as they force both parties to make an assessment of the strength or the weakness of case and the probable outcome if it goes on to either of the formal systems, where a binding decision is made.

Thus when it is the perception of either contractors or their legal advisors that the parties to the disputes are entrenched, the conciliatory forms of ADR will not be chosen and the formal procedures will be used in preference to them. Therefore, it is likely that, when the parties have reached the stage of seeking the advice of legal advisors, there are only a few disputes between main contractors and sub/specialists where ADR will be considered. The survey reveals that most disputes will be settled using the standard negotiation practices employed in the construction industry. For the remaining disputes, the parties are likely to be too entrenched in their positions by the time the dispute reaches the legal advisor for ADR to be regarded as appropriate, particularly the conciliatory forms of ADR. Conciliatory forms of ADR, mediation and conciliation, are unlikely to develop significantly as a choice for main contractors and sub/specialist if they leave the selection of these procedures until they have consulted their legal advisors.

ADR covers an array of disparate processes and it has been suggested that different types may be appropriate at different stages of any dispute.⁵⁰ One view in the literature is that ADR can be viewed as an alternative to negotiation and not as an alternative to the formal systems of dispute resolution.⁵¹ The research indicates that conciliatory forms of ADR are

⁵⁰ Roberts S. (1995) Litigation and Settlement Reform of the Civil Procedure Edited by Zuckerman and Cranston Clarendon Press: Oxford

⁵¹ For example: Cooper C. A. (1992) Mediation: The Experience in the United States First International Conference for Construction Management and Dispute Resolution. UMIST
Fisher R. and Ury W. (1982) Getting to Yes Arrow: London pages The writers discuss the concept of "principled negotiation", where four basic elements: separating the people from the problem, focusing on interests not positions, generating

perceived to have a limited application in disputes between main contractors and sub/specialists when the parties are polarised in positions or the dispute concerns delayed payment. These forms of ADR are more likely to develop if they are perceived by contractors to be a method of more formalised negotiation, to use when the usual negotiation practices have failed to reach a settlement or in conjunction with them.

Adjudication is not a conciliatory procedure as it has a third party neutral making a decision and, therefore, it must be considered separately from other models of ADR. The research shows that most contractors seek legal advice only when their normal practices of negotiation have failed to reach settlement. It is at such times that conciliatory approaches are perceived by both contractors and legal advisors to be inappropriate. However, the fact that statutory adjudication is to be binding, has strict times scales imposed and most contractors believe it is the most suitable procedure for the construction industry is likely to make it more attractive to some contractors than the formal systems, which are perceived to be too expensive and slow.

The comments from the survey population also reveal that contractors are of the opinion that ADR is not appropriate when a dispute is legally complicated or requires a legal precedent. This view was substantiated by the legal advisors in the legal interviews. Thus when contractors consult with a legal advisor and there is a legal issue at stake, this will be a factor which is likely to influence negatively the selection of ADR.

Some contractors are of the opinion that ADR may not be suitable for very complex, technical disputes.⁵² This problem is exacerbated if the ADR fails to reach a settlement and the parties are required to continue with the formal systems of dispute resolution. As discussed, earlier there is opinion held by some contractors and legal advisors that

possibilities and insisting the result is based on objective standards, can be adapted to "principled mediation" because the mediator can question problems and invent options which are more likely to be acceptable to both parties.

⁵² Previously it was discussed that the some of the legal interviewees believe that adjudication is limited in its application to less complex disputes. Here the respondents were discussing all the ADR procedures more generally.

adjudication, more specifically, is limited in its application to less complex disputes. It is likely that the complexity of construction disputes will be a factor which is influential in the choice of dispute resolution procedure. Thus, for some complex construction disputes, the formal procedures are likely to continue to be selected before ADR.

Finally, another major factor, which is identified as making ADR inappropriate for all construction disputes, is the contractors' perception that a binding decision is required. This has already been discussed above and the conclusion is that it is a major contributory factor influencing the choice of ADR.

2.1.1 Summary of contractors perceptions about the appropriateness of ADR to settle all construction disputes.

An analysis of the qualitative data reveals that contractors hold a number of perceptions about the appropriateness of ADR to resolve all construction disputes. Although it is not suggested that these factors are statistically significant, they are an indication of the likely considerations to be used by contractors in their decision of which dispute resolution procedures to use. Thus, when a dispute is legally or technically complex or where one or both parties are entrenched in their position and not prepared to compromise, or when a binding decision is required, the parties are more likely not to use ADR.

2.2 Financial size of dispute

In order to discover whether the financial size of disputes influences contractors' choice of ADR, two tests were used. First, contractors were asked to assess their level of agreement to three statements: ADR is **only** suitable for small disputes under £100,000; ADR is **more** suitable for disputes under £100,000 and ADR is suitable for **any** size of dispute. Second, the respondents were asked to assess the level of suitability of different dispute resolution procedures to different financial sizes of dispute.

2.2.1 Limitation of ADR to financial sizes of dispute.

Contractors do not agree that ADR is suitable for small disputes under £100,000 **only** but, the statistical tests suggest that there is a trend for main contractors in the smallest turnover category (£6 million and under) and sub/specialist contractors in the largest

turnover category (£50 million and over) to agree. (This sub-group is small in number and, therefore, this result is treated with caution.) Contractors neither agree nor disagree that ADR is **more** suitable for disputes under £100,000 and no group significantly differs from that. Finally, contractors significantly agree that ADR is suitable for **any size** of dispute but there is a trend for a significant difference in opinion for sub/specialist contractors with a turnover of £50 million and over who disagree. Thus, contractors are unlikely to perceive that ADR is confined to disputes with a financial size of under £100,000 but sub/specialist contractors with a turnover of £50 million and over are more likely to do so. The follow-up interviews and comments indicate that contractors do not believe that size of dispute precludes the use of ADR but there is reluctance to risk using ADR for large disputes, when the formal procedures are preferred. Many of the legal advisors are similarly of the opinion that the formal systems are more suitable for large disputes as they provide a final decision. This allows the individual who is responsible for the settlement of the dispute to blame the final outcome on the formal processes rather than his or her involvement in the ADR procedure.

2.2.2 Suitability of different dispute resolution procedures to different sizes of dispute.

A further test was used to ascertain whether the survey respondents believe that different dispute procedures are more suitable for different financial sizes of dispute. Seven dispute procedures were tested at five different levels of financial dispute. The results indicate that the respondents to the survey perceive that some dispute resolution procedures are more suitable to resolve disputes at different financial sizes and there is no difference between groups except for sub/specialist contractors with a turnover of £50 million and over. This sub group was *small in number and any conclusions drawn take that fact into account.*

The results show that three ADR procedures; mediation, conciliation and adjudication are perceived by contractors to be significantly suitable for small financial sizes of dispute and as the size of the dispute increases the perception of the suitability of these procedures decreases. For disputes over £1 million, these procedures are perceived to be significantly unsuitable. Thus, contractors are more likely to consider using these three ADR

procedures for disputes under £1 million than for disputes with a financial worth of over £1 million.

The converse is true for the formal procedures of litigation and arbitration, which are found to be significantly suitable for large disputes of £1 million and over but, as the financial size decreases, this suitability declines. Both formal procedures are perceived to be significantly unsuitable for disputes of £250,000 and under. Thus, contractors are more likely to use either litigation or arbitration for disputes over £1 million.

At the present time, contractors are likely to continue to use the formal systems to resolve disputes which are over £1 million in financial size and mediation, conciliation and adjudication are unlikely to be chosen. The experience of contractors who have used ADR supports this finding. Out of 21 occasions that ADR has been used, 17 concerned disputes under £1 million. Of the 12 occasions that ADR successfully settled the dispute 10 were under £1 million. Although most of the interviewees in the follow-up interviews believe that ADR is suitable for any size of dispute, they admit that they would be cautious about using it for large disputes because there is relatively little evidence that ADR works and they need to know more information about its successes before it is selected.

It is notable that arbitration is perceived to be suitable for disputes between £250,000 and £1 million, whereas litigation is perceived as being unsuitable at that level. For disputes between £250,000-£1million, contractors perceive that arbitration, mediation, adjudication and conciliation are all suitable. The survey revealed that ADR is not being used frequently and, therefore, it is suggested, that for disputes that arise between these financial sizes the other factors which influence choice of ADR; non-binding weakness, delay, the legal and technical complexity of disputes, are likely to be more influential. In particular, contractors believe that it is a weakness of ADR that it is non-binding. It is suggested that this is influencing the choice of ADR negatively. Thus, in disputes between £250,000-£1 million, binding procedures are more likely to be chosen and arbitration is more likely to be chosen at this financial range before ADR. When adjudication is implemented as a statutory right, it is more likely to be chosen before the

other types of non-binding ADR procedures.

The results of the survey indicate that contractors do not believe that the DRB and the Executive Tribunal are significantly suitable for all financial size of disputes tested. They are perceived to be significantly unsuitable for disputes over £1 million and, thus, are unlikely to be chosen to resolve a dispute at this financial level and over. Contractors do perceive that they are suitable for disputes under £1 million but at every level, mediation, conciliation and adjudication are perceived as being significantly suitable and, thus, contractors are more likely to choose one of these ADR procedures in preference to a DRB or an Executive Tribunal.

Statistical tests indicated sub\specialist contractors with a turnover of £50 million and over are significantly different from all the other groups in their perceptions about the suitability of different procedures to resolve different sizes of dispute, but as noted, caution is expressed about this finding. This group perceive conciliation to be significantly suitable for all financial sizes of dispute and thus it is likely that this group will select conciliation in preference to other ADR procedures.

2.3 Summary of the influence of financial size.

The survey results indicate that contractors hold attitudes about the suitability of the financial sizes of disputes to different procedures. The follow-up interviews and comments from the respondents indicate that they lack knowledge about ADR and, therefore, are unable to make informed decisions. Interviewees indicated that, if involved in disputes, they will not consider testing the procedures on large financial disputes. Here, the formal systems will continue to be used until such time as there is more information. ADR is unlikely to be used until there it is has a proven track record but there will be little or no track record until it is used. Under these circumstances, ADR will not develop unless more information reaches the construction industry about its successes. The potential development of ADR will be either "forced" by the implementation of the requirement of ADR through contract or the court. Its development is likely to be affected further if the reforms of 1996 Arbitration Act are perceived by contractors to be effective. Arbitration has the advantage of being binding

and having a 'track record'. If the proponents of ADR wish to develop its use, they must address the lack of confidence that some contractors, particularly sub/specialists, have in ADR by providing information about their successes. This is a difficult task, because ADR is confidential and parties to a dispute often do not wish others in the industry to know about their problems.⁵³

The major findings of the research have been reported and, where applicable, the differences between the groups tested have been highlighted and any anomalies have been exposed. Evidence has been provided which supports and confirms the hypotheses of the thesis. The final chapter draws together the conclusions of the research and makes recommendations.

⁵³ Frequently comments were made in the survey data and the follow-up interviews about the confidentiality of information which was given.

CHAPTER 9

CONCLUSIONS AND RECOMMENDATIONS

The aim of this chapter is to draw together the conclusions of the thesis which were extracted in the previous chapter and to present recommendations for the future development of ADR as a dispute resolution procedure for contractors in the construction industry. Recommendations for further research will be provided.

1 Conclusions on the first hypothesis: The development of ADR in the Construction Industry is due to dissatisfaction with the formal systems of dispute resolution.

The findings of the survey confirm the first hypothesis, in part. Contractors are dissatisfied with some features of both formal systems of dispute resolution, namely those concerning their cost, speed and the threatening and confrontational nature of the adversarial approach. In comparison, contractors hold positive perceptions regarding these features about ADR. Despite this finding, the survey discloses that ADR is not used frequently by contractors and, therefore, it is developing only in the sense that there is a growing awareness of ADR by contractors. Any statistical differences of perception between "contractor type" and "turnover size" do not indicate a divergence of opinion about the formal systems but there are differences in level of agreement or disagreement about the attitude statements. It is concluded that these differences will not affect contractors' choice of ADR adversely but are more likely to affect adversely the choice of either litigation or arbitration.

The findings of the postal survey show that contractors hold positive perceptions about ADR and that a majority of contractors will consider using it to resolve construction disputes. The predominant reasons given by contractors for considering the use of ADR are its costs and speed compared to either litigation or arbitration. Contractors hold very positive perceptions about ADR when the attributes tested are ones which the formal systems are perceived to be lacking. Thus, ADR is perceived to be significantly cheaper, quicker and less confrontational and threatening than either litigation or arbitration. However, contractors are less confident in their perceptions that ADR is good for multiple

claims, has a good settlement rate and is flexible. It is concluded that there is a substantial lack of knowledge about the more technical attributes of ADR; The absence of experience of both contractors and their legal advisors can explain some of this unawareness.

Many of the perceptions about the qualities of ADR are caused by default because of contractors' perceived dissatisfaction with certain aspects of the formal systems. There is no significant difference of response between either "contractor type" or "turnover size" on the perceived qualities of ADR. Again, any differences between groups which were discovered are not differences of opinion but of level of agreement. The differences did reveal that main contractors are more confident about the perceived advantages of ADR and the follow-up interviews support the theory that this is a consequence of larger organisations having better resources, which gives more access to information. This proposition is further supported by the results of the inferential statistics, which yielded significant differences between groups saying they would consider using ADR. Main contractors are more likely to say that they will use ADR than sub/specialist contractors and there is a relationship between "turnover size" and using ADR. Organisations with a turnover of over £6 million are more likely to say they will consider using ADR than those with a turnover of £6 million and under.

It is concluded that the differences between groups on their perceptions about the advantages of ADR will not adversely affect the choice of ADR as a dispute resolution procedure but are more likely to make it a more attractive option for some contractors, in particular main contractors, who are more knowledgeable about ADR than others.

Contractors are significantly in agreement with the proposition that litigation is unsatisfactory. However, contractors do not perceive arbitration to be an entirely unsatisfactory procedure. Contractors do perceive that ADR is cheaper, quicker and less threatening and confrontational than arbitration. The principal aim of the Arbitration Act 1996 is to reform arbitration and produce a dispute resolution procedure, which avoids unnecessary delay and expense. Expense and delay are the characteristics of arbitration which are criticised by contractors. Thus, the perception held by contractors that

arbitration is neither satisfactory or unsatisfactory will be pivotal in the future development of ADR. It will affect the choice of dispute resolution procedure by contractors in the construction industry, who are likely to continue to elect to use arbitration if the perceived unsatisfactory attributes of costs and delay have been satisfactorily addressed by the 1996 Arbitration Act. Further, arbitration has the advantage of being a binding dispute resolution procedure and one of the negative perceptions which is restricting the use of ADR is that it is non-binding.

The research exposes an anomaly. 80% of contractors agree that there is a need to move away from the adversarial approach but the legal advisors state that, in their experience, by the time they are consulted, their clients demand this approach. Most disputes between contractors settle without the parties seeking legal advice, using the normal negotiation practices of the industry. For disputes which do not settle using negotiation and where the parties decide they need to know the strengths and weaknesses of their argument, legal advisors will be consulted and, therefore, are likely to be very influential in the choice of dispute resolution procedure.

For many disputes between main contractors and sub/specialist contractors, it is the opinion of most legal advisors and contractors that a conciliatory approach, which is used by some ADR procedures, is not appropriate. (Mediation and conciliation use a conciliatory technique.) ADR is not deemed to be appropriate when the parties are polarised or entrenched in their arguments and are not prepared to compromise. In these situations, the formal systems of dispute resolution are recommended by legal advisors in preference to ADR because they force the parties to evaluate their position and appraise the other parties' case. Most legal interviewees, who represent sub/specialist contractors, are of the opinion that ADR is not suitable for disputes with main contractors, when the main contractor's objective is delaying payment. In these circumstances, legal advisors will not recommend the conciliatory types of ADR because they believe that the formal systems of dispute resolution are more effective, as they ensure that the main contractor has to take the sub/specialist's claim seriously. The above findings strengthen further the conclusion that arbitration will be used in preference to ADR.

There are many different models of ADR, which range from relatively formalised procedures, such as the Executive Tribunal, to the conciliatory approaches of mediation and conciliation. Disparate forms of ADR may be suitable for different stages of the dispute. Legal advisors do not believe the conciliatory forms are suitable for most disputes between main contractors and sub/contractors. It is unlikely that legal advisors will recommend ADR for these disputes.

The research hypothesis that ADR is developing due to dissatisfaction with the formal systems is supported by the finding that contractors are dissatisfied with some features of both litigation and arbitration. However, ADR is not developing in the sense that contractors are using the procedures extensively but it is developing in the sense that contractors hold positive perceptions about the potential advantages that it may have as a dispute resolution process. The support that contractors have for arbitration and their legal advisors have for the formal systems, provides evidence that the potential contribution of ADR to the dispute resolution needs of contractors is currently likely to be restricted at the present time and that the implementation of the 1996 Arbitration Act will restrict this development further.

1.1 Recommendations

If the aspiration of the proponents of ADR is for the conciliatory models of mediation and conciliation to develop, then there is a need for the construction industry to have a perception of their potential advantages at a much earlier stage of the dispute, which is before legal advice is sought and before the parties have become polarised in their arguments. It is recommended that, rather than distinguishing ADR as an alternative to the formal systems, it is more appropriate to consider it as an alternative or corollary to the negotiation practices that are used in the construction industry. For contractors to be encouraged to hold this perception, there is a need to change the attitudes of both the contractors and the professionals involved in the construction industry. It is recommended that further research is needed in this area and in particular on the use of conciliatory types of ADR as part of negotiation practices between main contractors and sub/specialist contractors.

2 Conclusions on hypotheses two and three: Contractor hold negative perceptions of ADR and Negative perceptions influence the choice of ADR by contractors.

The respondents are neutral in their view of the statement that ADR reveals too much of the case to the opposition and significantly disagree with the statement that using ADR is a sign of weakness. Thus it is concluded that contractors do not generally hold these negative perceptions. Nevertheless, the findings of the survey confirm the hypothesis that contractors hold the negative perception that ADR can be used for delay and statistical tests indicate that sub/specialists significantly agree more, whereas main contractors do not significantly agree or disagree. There is also a trend for main contractors, with a turnover of £50 million and over, to agree significantly that ADR can be used for delay. Further, contractors significantly agree that the weakness of ADR is that it is non-binding and no groups tested differ in this opinion. The research confirms the second hypothesis that contractors hold negative perceptions about ADR.

Sub/specialists, who are in dispute with main contractors are unlikely to want to use any form of ADR procedure if it is likely to create even more delay in settling their claims; this is corroborated by the legal interviewees. Most of the legal advisor interviewees attested to the fact that, in disputes between main contractors and sub/specialists contractors, the formal systems are the most obvious choice of dispute resolution procedure, because these disputes are usually about the main contractor trying to create delay and the failure of the main contractor to take the sub/specialists claim seriously. The legal advisor interviews support the evidence from the survey that legal advisors are involved in manipulating the formal systems in order to create delay for their clients. Further, some legal advisors believe that ADR can be utilised for this objective, which supports the perception held by sub/specialists contractors. The issue of delay is intrinsically linked to the non-binding nature of ADR. If a party wishes to delay settlement, s/he agrees to use an ADR procedure then refuses to reach a settlement or agree to the neutral's decision. This forces the other party to continue with the formal systems of dispute resolution.

Contractors perceive that the weakness of ADR is that it is non-binding and this factor is

influencing the choice of ADR by contractors. The supporters and users of ADR are quick to point out that the non-binding nature of ADR is not a weakness because, once a settlement has been reached, a binding contract can be drawn up to delineate the agreement. This view is not shared by contractors and thus contractors are less likely to choose a non-binding form of ADR. This is particularly so for sub/specialists, who are vitally concerned with the problem of delay and the need for a quick resolution of disputes. The third hypothesis, which is that negative perceptions are influencing the choice of ADR by contractors is supported and it is concluded that the non-binding forms of ADR are unlikely to be chosen by most contractors.

One ADR procedure which is binding until practical completion is adjudication, which has been given as a statutory right in construction contracts, although it has yet to be implemented. It is the ADR procedure most similar to arbitration, in that a neutral person makes a binding decision. Contractors perceive that adjudication is the most suitable form of ADR for the construction industry. Statistical tests show that main contractors with a turnover of £50 million and over differ in this perception and this is a difference of opinion. Main contractors in this turnover category are unlikely to choose adjudication but this problem has been circumvented, as adjudication has been given as a statutory right and, therefore, this group will not be able to prevent its use by the other party, when the Act comes into force. Contractors are likely to choose adjudication before other forms of non-binding ADR because it will have the advantage of being binding until practical completion.

The research findings show that sub/specialists are particularly concerned with the issue of delay in payment and, therefore, are likely to find adjudication an attractive forum. Contractors and their legal advisors are less likely to perceive adjudication as being satisfactory for more complex disputes as there is a stringent timescale for the adjudicators to reach their decisions and this may, therefore, preclude its selection for these disputes. It is likely that arbitration will be selected by contractors before adjudication, particularly when the dispute is complex and if contractors and their legal advisors perceive that the problems of costs and delay, which beset arbitration, will be neutralised by the Arbitration Act of 1996.

Contractors hold the perception that the weakness of ADR is that it is non-binding and this is influencing its choice as a dispute resolution procedure. The non-binding ADR procedures may be more suitable at the earlier stages of a dispute, when the issue of the procedure not being binding will be an advantage and not a disadvantage in the same way as negotiation and non-prejudicial meetings are.

2.1 Recommendations

If the proponents of ADR wish to increase the use of non-binding procedures they must alter the perception of contractors that its non-binding character is a weakness. This may be achieved by concentrating on the use of the non-binding procedures as an alternative to or corollary of negotiation at a much earlier stage of the dispute. To achieve this objective there is a need to bring about a change in the perceptions of contractors and the professionals involved in the industry.

Research is required into the use of conciliatory forms of ADR as a negotiation tool in the construction industry. It is recommended that further research is required into the choice of adjudication and arbitration by contractors, particularly in the use of both for complex disputes. Research is required into the practices and procedures adopted by arbitrators following the new powers vested in them since the 1996 Arbitration Act.

3 Conclusions on Hypothesis four: Legal advisors in the construction industry are influencing the development of ADR.

The fourth hypothesis of the thesis is that legal advisors influence the choice of ADR. This is based on the premise that most people settle disputes with reference to *the outcome* if it goes to court and for many people this cannot be achieved without the advice of legal advisors. Over 70% of contractors stated that they would consider resolving a construction dispute without the advice of a legal advisor. An analysis of the comments and the follow-up interviews discloses that contractors are considerably dissatisfied with the costs of legal advisors, the standard of their advice and there is a perception that contractors "know their own business."

Legal advisors are not consulted for every dispute that arises between contractors but their

advice is sought in identified sets of circumstances. Thus, when the parties are entrenched or polarised in their arguments, when they need to know the strengths and weaknesses of their case and when there is a complex legal issue, contractors will seek legal advice. It is in these situations that legal advisors are likely to influence the choice of dispute resolution procedure.

Legal advisors are not opposed to ADR but it is their experience that often their clients adopt an adversarial approach by the time they are consulted. Legal advisors do not recommend conciliatory types of ADR when their clients adopt or demand an adversarial approach. In these circumstances, arbitration or litigation are recommended. Further, many of the legal advisors who represent sub/specialist contractors do not believe that the conciliatory types of ADR are appropriate for disputes where the main contractor is merely attempting to delay settlement and is refusing to take the sub/specialist's claim seriously. In these situations, legal advisors will not recommend the use of conciliatory ADR procedures.

Contrary to the perception of contractors, some legal advisors are of the opinion that ADR can be utilised to discover the strengths and weaknesses of both their clients' and their opponents' case and thus can be used tactically. If this becomes a more generally held perception by legal advisors, it will restrain them from recommending ADR to their clients and thus prevent ADR being selected as a dispute resolution procedure by contractors.

A further potential limitation for the development of ADR is that some legal advisors, again contrary to the perception of contractors, believe that ADR is not cheap. The survey results indicate that 70% of contractors will consider using ADR and one of the major reasons given was that ADR is cheaper than the formal systems. If lawyers advise that ADR is not cheap, it is likely that it will not be selected by contractors for the resolution of their disputes.

Legal advisors will be used by contractors to assist in the ADR procedures. There is a clear division of opinion about using legal advisors in ADR between contractors who

agree that they would consider settling construction disputes without legal advice ("Yes" group) and those who would not ("No" group). All contractors agree with using legal advisors in the formal systems of litigation and arbitration but there is a difference between the "Yes" and "No" groups in using legal advisors to assist in ADR. The "No" group are neutral about using legal advisors in conciliation but agree with using them in mediation, adjudication the DRB and the Executive Tribunal. The "Yes" group disagree with using legal advisors in mediation and conciliation but are neutral about using them for adjudication, the DRB and the Executive Tribunal. Although legal advisors are likely not to be used in ADR when both parties are from the "Yes" group, it is likely that when one party decides on legal representation, the other party will seek representation also. Where adjudication is concerned, the respondents from the "Yes" group are more undecided about legal representation and, therefore, if they are in dispute with a party from the "No" group, are more likely to use legal advisors. Legal advisors are more likely to be used in adjudication.

Arbitration resembles court room procedures because of the increasing involvement of the law and the legal profession. Legal advisors are likely to be used in adjudication and thus adjudication is likely to mirror the development of arbitration and become increasingly procedurally bound. It is for contractors to decide the level of input that they require from their legal advisors but it is likely that, if it is an extensive involvement, this will result in adjudication becoming increasingly "juridified".¹

3.1 Recommendations

It is recommended that there is further research into the attitudes of legal advisors about ADR and their role in dispute resolution, in order that contractors can make informed decisions about the involvement of their legal advisors in the various procedures. Research is required into the attitudes of legal advisors on the practice and procedures to adopt in the adjudication procedure.

¹ Flood J. and Caiger A. (1993) op cit. The writers use the term "juridification of arbitration".

4 Appropriateness and limitations of ADR

4.1 Perceptions of the appropriateness of ADR to resolve construction disputes.

There is a substantial lack of knowledge by contractors about ADR, particularly about the more technical aspects of ADR and the perceived appropriateness of ADR to resolve all types of construction dispute. Contractors hold a number of perceptions about the inappropriateness of ADR to resolve all types construction disputes. Although these factors are not statistically significant, they are an indication of the likely determinants which will be used by contractors in their choice of ADR. Thus, when a dispute is legally or technically complex and when one or both parties are entrenched in their positions and unwilling to compromise, the parties are more likely not to use ADR. Finally, another major factor making ADR inappropriate is when contractors perceive that a binding decision is required. Contractors and legal advisors perceive that there are limitations to the use of ADR and these perceptions are likely to influence the choice of ADR.

4.2 Financial size of dispute

Contractors do not agree, generally, that ADR is suitable for disputes under £100,000 only but there is a trend for sub/specialist contractors in the largest turnover category (£50 million and over) and main contractors in the smallest turnover category (£6 million and under) to disagree. Contractors agree, generally, that ADR is suitable for any size of dispute but sub/specialist contractors with a turnover of £50 million and over disagree. Thus, it is unlikely that contractors, except those in the defined groups, will confine the use of ADR to disputes under £100,000.

However, contractors perceive that *some dispute resolution procedures* are more suitable than others for different financial sizes of dispute. Three ADR procedures; mediation, conciliation and adjudication are perceived to be significantly suitable for small financial sizes of disputes and, as the financial size of the disputes rises, the perception of the suitability decreases. For disputes over £1 million, these procedures are perceived to be significantly unsuitable. Thus, contractors are more likely to consider using these three ADR procedures for disputes with a financial worth of under £1 million.

The converse is true for the formal procedures of litigation and arbitration, which contractors perceive to be significantly suitable for large financial disputes of £1 million and over but, as the financial size decreases, this suitability declines. Both formal procedures are perceived by contractors to be significantly unsuitable for disputes under £250,000. Thus contractors are more likely to use either litigation or arbitration for disputes with a financial size of over £1 million.

The current proposals by the Woolf report, if implemented, may make litigation more attractive for smaller financial disputes but, the research shows that, regardless of the reforms of either litigation or arbitration, they are not likely to lose their pre-eminence for large financial sizes of disputes.

Arbitration, notably, is perceived by contractors to be suitable for disputes between £250,000 and £1 million, whereas litigation is not. For disputes between these financial sizes, contractors perceive that arbitration, mediation, conciliation and adjudication are suitable. Contractors do not frequently use ADR, and one factor for this the perception that a weakness of ADR is that it is non-binding. It is likely that, for disputes between £250,000 and £1 million, either arbitration or adjudication, which are binding, are more likely to be selected than either mediation or conciliation. Arbitration is more likely to be selected before adjudication for more complex disputes.

Contractors perceive that both the Executive Tribunal and the DRB are suitable, but not significantly so, for disputes over £1 million and thus are more likely to select the formal systems. Contractors do perceive that they are suitable for disputes under £1 million but at every financial level tested, mediation, conciliation or adjudication are perceived by contractors to be more suitable and, thus, contractors are more likely to select these ADR procedures for disputes under £1 million.

Contractors want better methods to help resolve their disputes than is currently available. Contractors hold perceptions about the appropriateness of ADR to resolve some financial disputes and the suitability of different dispute resolution procedures to resolve disparate sizes of dispute. For disputes over £1 million, both arbitration and litigation are likely to

be chosen by contractors before mediation, conciliation, adjudication, the Executive Tribunal or the DRB. The financial sizes of disputes are an influential factor for contractors, when making choices about which dispute resolution procedures to use. Members of the construction industry are of the opinion that they lack enough knowledge about ADR to make an informed decision and are disinclined to experiment with ADR on large financial disputes; here it is likely that the formal systems will continue to be used. Hence, unless more information reaches the construction industry about successes with ADR, its development is likely to be restricted.

4.3 Recommendations

If the advocates of ADR wish it to develop, particularly in the use of large financial disputes, there is need to bring about a change in the perceptions of contractors. To achieve this objective, contractors and the professionals involved in the industry require further information about the suitability of ADR to different financial sizes of disputes. If the proponents of ADR wish to increase its use by contractors, the organisations that promote ADR, together with the organisations that represent construction, should monitor and report contractors experiences on a regular basis.

Finally, it is recommended that further research is needed into the suitability of the diverse ADR procedures to different financial sizes of disputes and the appropriateness of ADR for different types of dispute.

STATUTES AND CASES

"An Act for determining differences by arbitration." 1698

"An Act for the further Amendment of the Law and the better advancement of Justice."
1833

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Arbitration Act 1950

Arbitration Act 1979

Courts and Legal Services Act of 1990

Arbitration Act 1996

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APPENDIX ONE

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11th May 1995

Dear

SURVEY OF THE CONSTRUCTION INDUSTRY

I am a senior lecturer of law at Oxford Brookes University researching into dispute resolution in the construction industry, in particular the research is centred on the perceptions and experiences of the construction industry with Alternative Dispute Resolution (ADR).

Research has indicated that one of the most sensitive areas of dispute is between main contractors and specialist/sub contractors and the indications are that this will be the most likely area for the potential development of ADR. The survey is therefore centred around this contractual relationship.

Your organisation, Partitioning & Interiors Association (PIA), was approached to assist with the research and they have provided a selected list of their membership. I am now contacting you to ask for your help. It is hoped that this research will be a major contribution to the present knowledge in this field. The findings of the research will of course be circulated to the PIA.

It is not necessary that you have any experience of ADR your opinions and views will be a valuable contribution. Two questionnaires are enclosed, one for organisations which have never used ADR and one for those who have experienced it.

I know that your time is valuable but please spare a short time to participate. I can assure you that any of your comments or responses will be treated anonymously. Any numerals on the questionnaires are only for administrative purposed not for identification.

Yours sincerely

Penny Brooker
(Senior Lecturer in Law)

8th June 1995

Attention of the Managing Director

SURVEY OF THE CONSTRUCTION INDUSTRY

Recently I approached you requesting your help in a major survey of main contractors and specialists/sub contractors views on dispute resolution.

I am writing again to urge you to participate in this research activity which has the approval and support of your representative organisation the Steel Windows Association. Your views are essential when taken with the builder and general contractor to ensure a balanced report.

I am enclosing copies of the questionnaires together with a pre-paid envelope. Only one questionnaire needs to be completed. It is irrelevant if you have never used Alternative Dispute Resolutions (ADR). Your participation is invaluable, not only for the purpose of this research but on a much wider industry basis.

If you have any questions about the research please do not hesitate to contact me.

Yours faithfully

Penny Brooker
(Senior Lecturer in Law)

SURVEY OF THE CONSTRUCTION INDUSTRY'S
PERCEPTIONS OF ALTERNATIVE DISPUTE
RESOLUTION

QUESTIONNAIRE 1

IF YOU HAVE NEVER USED ADR PLEASE
COMPLETE THE FOLLOWING QUESTIONNAIRE.

It is irrelevant if you have never used ADR your
opinions and views are still important to the
research.

This questionnaire should only take about 15 minutes
to complete.

As there is, to date, a confusion of definitions for
ADR, for the purposes of this survey a list of
definitions follows on the next page.

Please complete and return by

DEFINITIONS

As there is, to date, a confusion of definitions for the purposes of this survey the following definitions should apply.

Adjudication:	Where a third party neutral gives a decision which may be binding on the parties in dispute unless they wish to proceed to formal arbitration. In most instances this decision is binding for the duration of the contract.
Arbitration:	Arbitration is process which is subject to statutory controls in England and Wales, whereby the formal disputes are determined by a private tribunal of the parties choosing. The decision is final except for a few safeguards and enforceable at law.
Conciliation:	A process whereby a neutral person assists the parties to reach a negotiated settlement but if the parties fail to reach a settlement the conciliator will give a reasoned decision.
Dispute Review Advisor:	A neutral third party who advises on a problem or potential dispute which requires clarification as to the best methods of reaching settlement. Sometimes described as early settlement advisor.(CIC)
Dispute Review Board/Panel:	Dispute Review Board/Panel is an expedited non-binding procedure whereby an independent board, usually of three people is established to evaluate disputes and to make settlement recommendations to the parties. The board members become knowledgeable about the project by periodically visiting the site.
Executive Tribunals:	Executive tribunals are a formalised method of ADR consisting of one executive from each side or party in dispute and a neutral. The executive must have power to settle. This process is sometimes termed "mini-trial".
Expert Determination:	Expert determination is a means by which the parties to a contract jointly instruct a third person to decide an issue.
Litigation:	Procedure of taking a dispute to court for settlement at law.
Mediation:	A voluntary, non-binding private dispute resolution process in which a neutral person helps <i>the parties to try to reach</i> a negotiated settlement. (CEDR)
Negotiation:	Negotiation is a process for resolving conflict between two or more parties whereby both or all modify their demands to achieve a mutually acceptable compromise. (Kennedy, Benson and McMillan).
Partnering:	Partnering is a long term commitment between two or more organisations for the purposes of achieving business objectives. By maximising the effectiveness of each participants's resources. (NEDC)

IF YOU HAVE NEVER USED ADR PLEASE COMPLETE THIS QUESTIONNAIRE.

1. Has ADR ever been proposed as a process to help to resolve any construction dispute in which your organisation has been involved?

YES () NO ()

IF YOU HAVE ANSWERED NO PLEASE GO TO QUESTION 4.

IF YOU HAVE ANSWERED YES PLEASE CONTINUE

2. Please indicate which ADR procedures have been proposed and approximate number of times.

	0	1-5	6-20	over 20
Mediation				
Executive Tribunal				
Conciliation				
Adjudication				
Dispute Review Board/Panel				
Other please specify below				

3. How much do you agree or disagree with the following statements about your decision not to use ADR.

Please circle one number where 1 = strongly agree to 5 = strongly disagree.

Explanation of codes:

1	2	3	4	5
Strongly agree	agree	neutral	disagree	strongly disagree

There was no suitable ADR intermediary.	1	2	3	4	5
Arbitration was a more suitable forum.	1	2	3	4	5
The particular dispute was not suitable for ADR.	1	2	3	4	5
Litigation was a more suitable forum.	1	2	3	4	5
Our legal advisor did not recommend using ADR.	1	2	3	4	5
Our organisation had a lack of knowledge about ADR.	1	2	3	4	5
Using ADR would have suggested that our case was weak.	1	2	3	4	5
Did not want to use a non-binding procedure	1	2	3	4	5
Using ADR would have meant a compromise.	1	2	3	4	5
No ADR neutral had enough experience.	1	2	3	4	5
Using ADR would have meant a delay in settlement .	1	2	3	4	5
ADR would have exposed the organisation's position to the opposition.	1	2	3	4	5
There may have been problems enforcing ADR agreements.	1	2	3	4	5
ADR may have resulted in settling without discovering the other parties true strength.	1	2	3	4	5
The dispute was an "open and shut case".	1	2	3	4	5
There was "pressure to settle" from the other side.	1	2	3	4	5
The dispute was too large for ADR.	1	2	3	4	5
The dispute was too small for ADR.	1	2	3	4	5
Proposing ADR was a tactic for delay.	1	2	3	4	5

4. Circle how much you agree or disagree with the following statements about using ADR to resolve construction disputes.

It is irrelevant if you have little experience of ADR your opinions and views are important to the research.

1 Strongly agree	2 agree	3 neutral	4 disagree	5 strongly disagree
---------------------	------------	--------------	---------------	------------------------

SETTLEMENT

The settlement rate for dispute is high when using ADR. 1 2 3 4 5

ADR relieves the effect of the parties becoming entrenched in their positions. 1 2 3 4 5

ADR results in a commercial decision rather than a legal decision. 1 2 3 4 5

ADR is good for multiple claims. 1 2 3 4 5

FINANCIAL

Less money is spent on lawyers when using ADR. 1 2 3 4 5

ADR is only suitable for "small" disputes under £100,000. 1 2 3 4 5

ADR is cheaper than formal dispute resolution. 1 2 3 4 5

ADR saves management time. 1 2 3 4 5

ADR is suitable for any size of dispute. 1 2 3 4 5

TACTICAL

ADR can be used to create delay. 1 2 3 4 5

Using ADR is a sign of weakness. 1 2 3 4 5

ADR indicates compromise. 1 2 3 4 5

Legal advisors favour ADR. 1 2 3 4 5

PARTICIPATION

ADR is a less threatening forum than a court of law. 1 2 3 4 5

ADR is a less threatening forum than arbitration. 1 2 3 4 5

ADR allows you to participate more in resolving the dispute. 1 2 3 4 5

ADR is a consensual approach to dispute resolution. 1 2 3 4 5

GENERAL

ADR is not a new process, the construction industry already uses it. 1 2 3 4 5

ADR is confidential. 1 2 3 4 5

ADR reveals too much of the case to the opposition. 1 2 3 4 5

ADR is a quicker method to reach settlement than arbitration. 1 2 3 4 5

ADR is a quicker method to reach settlement than litigation. 1 2 3 4 5

5. Please circle if you agree or disagree with the following comments.

1 Strongly agree	2 agree	3 neutral	4 disagree	5 strongly disagree	
The legal profession will hi-jack ADR.	1	2	3	4	5
ADR is more suitable for disputes under £100,000.	1	2	3	4	5
Adjudication is the most suitable ADR procedure for the construction industry.	1	2	3	4	5
Construction industry disputes need a quick decision.	1	2	3	4	5
ADR is suitable for any size of dispute.	1	2	3	4	5
Construction disputes must be resolved with an independent neutral decision.	1	2	3	4	5
ADR should be put on a more formal setting.	1	2	3	4	5
Arbitration costs too much.	1	2	3	4	5
Litigation costs too much.	1	2	3	4	5
Arbitration is a satisfactory procedure for resolving construction disputes.	1	2	3	4	5
Litigation is a satisfactory procedure for resolving construction disputes.	1	2	3	4	5
There is a need to move away from the adversarial approach.	1	2	3	4	5
ADR is flexible.	1	2	3	4	5
ADR is less confrontational than formal systems of dispute resolution.	1	2	3	4	5
ADR is non-binding, this is a weakness of the procedures.	1	2	3	4	5

6. Would you consider using ADR to help to resolve a construction dispute?

YES () NO () DON'T KNOW ()

Please give reason(s) for your choice.

7. Please indicate how much you agree or disagree with inserting the following type of ADR clauses into construction contracts.

Mediation	1	2	3	4	5
Conciliation	1	2	3	4	5
Adjudication	1	2	3	4	5
Dispute Review (Board/Panel)	1	2	3	4	5
Executive Tribunal	1	2	3	4	5
Other (please specify)					
_____	1	2	3	4	5
_____	1	2	3	4	5
_____	1	2	3	4	5

Please note the reason(s) for this choice.

8. Do you consider ADR an appropriate method for the resolution of all types of construction dispute?

YES () NO () DON'T KNOW ()

Please give reason(s) for you choice.

9. Would you resolve a construction dispute without seeking advice from a legal advisor?

YES () NO () DON'T KNOW ()

Please give reason(s) for your choice.

Please circle how much you agree or disagree with using a legal advisor to assist in the following procedures when involved in a construction dispute.

Explanation of codes:

	1 strongly agree	2 agree	3 neutral	4 disagree	5 strongly disagree
Negotiation	1	2	3	4	5
Litigation	1	2	3	4	5
Arbitration	1	2	3	4	5
Mediation	1	2	3	4	5
Conciliation	1	2	3	4	5
Adjudication	1	2	3	4	5
Dispute Review Board/Panel	1	2	3	4	5
Executive Tribunal	1	2	3	4	5
Other ADR procedure (please specify)	1	2	3	4	5
	1	2	3	4	5

10. For the following dispute procedures please grade from 1-5, their suitability for the resolution of these different sizes of construction dispute.

1 being very suitable to 5 very unsuitable.

	Over £5 mill	Over £1 mill	Over £250,000	Over £50,000	Under £50,000
Adjudication					
Arbitration					
Conciliation					
Dispute Review Board/Panel					
Executive Tribunal					
Litigation					
Mediation					
Other please specify below					

11. Please could you state your position within your organisation or department.

12. For the purposes of categorisation in this survey please state the approximate annual turnover of your organisation.

13. For the purposes of classification in this survey would you please describe the main activities of your organisation.

eg piling glazing roofing scaffolding

14. Please add any additional comments that you think may be relevant to the survey.

15. Please state whether you would be prepared to take part in an interview, with me Penny Brooker, which would last about 30-40 minutes.

Yes () No()

If yes please fill in your name, address and telephone number below.

THANK YOU FOR TAKING THE TIME TO FILL THIS QUESTIONNAIRE IN.
YOUR OPINIONS ARE IMPORTANT TO THIS SURVEY.

SURVEY OF THE CONSTRUCTION INDUSTRY'S
PERCEPTIONS OF ALTERNATIVE DISPUTE
RESOLUTION

QUESTIONNAIRE 2

IF YOU HAVE USED ADR PLEASE COMPLETE THIS
QUESTIONNAIRE.

This questionnaire should only take about 20 minutes
to complete.

As there is, to date, a confusion of definitions for
ADR, for the purposes of this survey a list of
definitions follows on the next page.

Please complete and return by

DEFINITIONS

As there is, to date, a confusion of definitions for the purposes of this survey the following definitions should apply.

Adjudication:	Where a third party neutral gives a decision which may be binding on the parties in dispute unless they wish to proceed to formal arbitration. In most instances this decision is binding for the duration of the contract.
Arbitration:	Arbitration is process which is subject to statutory controls in England and Wales, whereby the formal disputes are determined by a private tribunal of the parties choosing. The decision is final except for a few safeguards and enforceable at law.
Conciliation:	A process whereby a neutral person assists the parties to reach a negotiated settlement but if the parties fail to reach a settlement the conciliator will give a reasoned decision.
Dispute Review Advisor:	A neutral third party who advises on a problem or potential dispute which requires clarification as to the best methods of reaching settlement. Sometimes described as early settlement advisor.(CIC)
Dispute Review Board/Panel:	Dispute Review Board/Panel is an expedited non-binding procedure whereby an independent board, usually of three people is established to evaluate disputes and to make settlement recommendations <i>to the parties</i> . The board members become knowledgeable about the project by periodically visiting the site.
Executive Tribunals:	Executive tribunals are a formalised method of ADR consisting of one executive from each side or party in dispute and a neutral. The executive must have power to settle. This process is sometimes termed "mini-trial".
Expert Determination:	Expert determination is a means by which the parties to a contract jointly instruct a third person to decide an issue.
Litigation:	Procedure of taking a dispute to court for settlement at law.
Mediation:	A voluntary, non-binding private dispute resolution process in which a neutral person helps the parties to try to reach a negotiated settlement. (CEDR)
Negotiation:	Negotiation is a process for resolving conflict between two or more parties whereby both or all modify their demands to achieve a mutually acceptable compromise.(Kennedy, Benson and McMillan).
Partnering:	Partnering is a long term commitment between two or more organisations for the purposes of achieving business objectives. By maximising the effectiveness of each participants's resources.(NEDC)

EXPERIENCES WITH USING ADR.

Please confine your answers to the use of ADR for construction disputes in the United Kingdom in the last 5 years.

- Please indicate which procedures of ADR your organisation has used and the approximate number of times?

	0	1-5	6-20	over 20
Mediation				
Executive Tribunal				
Conciliation				
Adjudication				
Dispute Review Board/Panel				
Other please specify below				

- Please tick which, if any, of the following reasons influenced you to use ADR.

Requirement of a contract clause	
Court recommendation to use ADR procedure	
The suggestion of the other party	
The type of construction dispute	
The financial size of dispute	
Dissatisfaction with arbitration	
Dissatisfaction with litigation	
Legal advice to use ADR	
Other reasons(s). (Please specify below.)	

Other reason(s)

SATISFACTION WITH ADR

Please circle one number, where 1 = very satisfied to 5 = very dissatisfied.

Explanation of codes:

1	2	3	4	5
Very satisfied	satisfied	neutral	dissatisfied	very dissatisfied

3. Please circle your general level of satisfaction with ADR as a process.

1 2 3 4 5

Please note the reason(s) for your general level of satisfaction with ADR as a process.

If your organisation has participated in any of the following ADR procedures please circle your general level of satisfaction with each.

Mediation	1	2	3	4	5
Conciliation	1	2	3	4	5
Executive Tribunal	1	2	3	4	5
Adjudication	1	2	3	4	5
Dispute Review Board (Panel)	1	2	3	4	5
Other (please specify below)					
_____	1	2	3	4	5
_____	1	2	3	4	5
_____	1	2	3	4	5

4. Please indicate how much you agree or disagree with inserting the following type of ADR clauses into construction contracts.

Mediation	1	2	3	4	5
Conciliation	1	2	3	4	5
Adjudication	1	2	3	4	5
Dispute Review (Board/Panel)	1	2	3	4	5
Executive Tribunal	1	2	3	4	5
Other (please specify)					
_____	1	2	3	4	5
_____	1	2	3	4	5
_____	1	2	3	4	5

Please note the reason(s) for this choice.

RESULTS OF USING ADR PROCEDURES

5. Using the following financial size of dispute please record for each grade the number of times the ADR procedure has been used and how often the dispute was settled, not settled or partially settled.

- (a) Over £5 million
- (b) Over £1 million but under £5 million
- (c) Over £250,000 but under £1,000,000
- (c) Over £50,000 but under £250,000
- (d) Under £50,000

MEDIATION

Never used	
------------	--

	(a) Over £5 million	(b) Over £1 million	(c) Over £250,000	(d) Over £50,000	(e) Under £50,000
Number of times used					
Settled					
Not settled					
Partially settled					

EXECUTIVE TRIBUNAL

Never used	
------------	--

	(a) Over £5 million	(b) Over £1 million	(c) Over £250,000	(d) Over £50,000	(e) Under £50,000
Number of times used					
Settled					
Not settled					
Partially settled					

ADJUDICATION

Never used	
------------	--

	(a) Over £5 million	(b) Over £1 million	(c) Over £250,000	(d) Over £50,000	(e) Under £50,000
Number of times used					
Settled					
Not settled					
Partially settled					

CONCILIATION

Never used	
------------	--

	(a) Over £5 million	(b) Over £1 million	(c) Over £250,000	(d) Over £50,000	(e) Under £50,000
Number of times used					
Settled					
Not settled					
Partially settled					

DISPUTE REVIEW BOARD (PANEL)

Never used	
------------	--

	(a) Over £5 million	(b) Over £1 million	(c) Over £250,000	(d) Over £50,000	(e) Under £50,000
Number of times used					
Settled					
Not settled					
Partially settled					

OTHER ADR PROCEDURES

Never used	
------------	--

	(a) Over £5 million	(b) Over £1 million	(c) Over £250,000	(d) Over £50,000	(e) Under £50,000
Number of times used					
Settled					
Not settled					
Partially settled					

Please specify the types(s) of ADR procedures used:

Please circle one number where 1 = strongly agree to 5 = strongly disagree.

1	2	3	4	5
Strongly agree	agree	neutral	disagree	strongly disagree

6. How much do you agree or disagree with the following statements about your organisations decision to use ADR.

SETTLEMENT

The settlement rate for dispute is high when using ADR. 1 2 3 4 5

ADR relieves the effect of the parties becoming entrenched in their positions. 1 2 3 4 5

ADR results in a commercial decision rather than a legal decision. 1 2 3 4 5

ADR is good for multiple claims. 1 2 3 4 5

FINANCIAL

Less money is spent on lawyers when using ADR. 1 2 3 4 5

ADR is only suitable for "small" disputes under £100,000. 1 2 3 4 5

ADR is cheaper than formal dispute resolution. 1 2 3 4 5

ADR saves management time. 1 2 3 4 5

ADR is suitable for any size of dispute. 1 2 3 4 5

TACTICAL

ADR can be used to create delay. 1 2 3 4 5

Using ADR is a sign of weakness. 1 2 3 4 5

ADR indicates compromise. 1 2 3 4 5

Legal advisors favour ADR. 1 2 3 4 5

PARTICIPATION

ADR is a less threatening forum than a court of law. 1 2 3 4 5

ADR is a less threatening forum than arbitration. 1 2 3 4 5

ADR allows you to participate more in resolving the dispute. 1 2 3 4 5

ADR is a consensual approach to dispute resolution. 1 2 3 4 5

GENERAL

ADR is not a new process, the construction industry already uses it. 1 2 3 4 5

ADR is confidential. 1 2 3 4 5

ADR reveals too much of the case to the opposition. 1 2 3 4 5

ADR is a quicker method to reach settlement than arbitration. 1 2 3 4 5

ADR is a quicker method to reach settlement than litigation. 1 2 3 4 5

7. Has your organisation ever decided not to participate in using ADR?

YES () NO ()

If yes on how many occasions? _____

If YES please circle how much you agree or disagree with the following statements about your decision NOT to use ADR.

Please circle one number where 1=strongly agree to 5=strongly

1	2	3	4	5
Strongly agree	agree	neutral	disagree	strongly disagree

There was no suitable ADR intermediary.	1	2	3	4	5
Arbitration was a more suitable forum.	1	2	3	4	5
The particular dispute was not suitable for ADR.	1	2	3	4	5
Litigation was a more suitable forum.	1	2	3	4	5
Our legal advisor did not recommend using ADR.	1	2	3	4	5
Our organisation had a lack of knowledge about ADR.	1	2	3	4	5
Using ADR would have suggested that our case was weak.	1	2	3	4	5
Did not want to use a non-binding procedure	1	2	3	4	5
Using ADR would have meant a compromise.	1	2	3	4	5
No ADR neutral had enough experience.	1	2	3	4	5
Using ADR would have meant a delay in settlement .	1	2	3	4	5
ADR would have exposed the organisation's position to the opposition.	1	2	3	4	5
There may have been problems enforcing ADR agreements.	1	2	3	4	5
ADR may have resulted in settling without discovering the other parties true strength.	1	2	3	4	5
The dispute was an "open and shut case".	1	2	3	4	5
There was "pressure to settle" from the other side.	1	2	3	4	5
The dispute was too large for ADR.	1	2	3	4	5
The dispute was too small for ADR.	1	2	3	4	5
Proposing ADR was a tactic for delay.	1	2	3	4	5

8. Would you resolve a construction dispute without seeking advice from a legal advisor?

YES () NO () DON'T KNOW ()

Please could you give reason(s) for your decision.

Please circle how much you agree or disagree with using a legal advisor in the following procedures when involved in construction dispute.

1 Strongly agree	2 agree	3 neutral	4 disagree	5 strongly disagree
---------------------	------------	--------------	---------------	------------------------

Negotiation	1	2	3	4	5
Litigation	1	2	3	4	5
Arbitration	1	2	3	4	5
Mediation	1	2	3	4	5
Conciliation	1	2	3	4	5
Adjudication	1	2	3	4	5
Dispute Review Board/Panel	1	2	3	4	5
Executive Tribunal	1	2	3	4	5
Other ADR procedure (please specify)	1	2	3	4	5
<hr/>	1	2	3	4	5
<hr/>	1	2	3	4	5
<hr/>	1	2	3	4	5
<hr/>	1	2	3	4	5

9. Please circle if you agree or disagree with the following comments.

1 Strongly agree	2 agree	3 neutral	4 disagree	5 strongly disagree	
The legal profession will hi-jack ADR.	1	2	3	4	5
ADR is more suitable for disputes under £100,000.	1	2	3	4	5
Adjudication is the most suitable ADR procedure for the construction industry.	1	2	3	4	5
Construction industry disputes need a quick decision.	1	2	3	4	5
ADR is suitable for any size of dispute.	1	2	3	4	5
Construction disputes must be resolved with an independent neutral decision.	1	2	3	4	5
ADR should be put on a more formal setting.	1	2	3	4	5
Arbitration costs too much.	1	2	3	4	5
Litigation costs too much.	1	2	3	4	5
Arbitration is a satisfactory procedure for resolving construction disputes.	1	2	3	4	5
Litigation is a satisfactory procedure for resolving construction disputes.	1	2	3	4	5
There is a need to move away from the adversarial approach.	1	2	3	4	5
ADR is flexible.	1	2	3	4	5
ADR is less confrontational than formal systems of dispute resolution.	1	2	3	4	5
ADR is non-binding, this is a weakness of the procedures.	1	2	3	4	5

10. For the following dispute procedures please grade from 1-5, their suitability for the resolution of these different sizes of construction dispute.

1 being very suitable to 5 very unsuitable.

	Over £5 mill	Over £1 mill	Over £250,000	Over £50,000	Under £50,000
Adjudication					
Arbitration					
Conciliation					
Dispute Review Board/Panel					
Executive Tribunal					
Litigation					
Mediation					
Other please specify below					

11. Please could you state your position within your organisation or department.

12. For the purposes of categorisation in this survey please state the approximate annual turnover of your organisation.

13. For the purposes of classification in this survey would you please describe the main activity of your organisation.

eg piling glazing roofing scaffolding

14. Please add any additional comments that you think may be relevant to the survey.

15. Please state whether you would be prepared to take part in an interview, with me Penny Brooker, which would last about 30-40 minutes.

Yes () No ()

If yes please fill in your name, address and telephone number below.

THANK YOU FOR TAKING THE TIME TO FILL THIS QUESTIONNAIRE IN.
YOUR OPINIONS ARE IMPORTANT TO THIS SURVEY.

TELEPHONE INTERVIEW SCHEDULE

ASK SECRETARY TO CONFIRM THAT THEY ARE MEMBER OF RELEVANT ORGANISATION.

1. NAME OF COMPANY

TELEPHONE NUMBER

2. DATE AND TIME INTERVIEWED

3. DATE TO MAKE RECALL IF NECESSARY

REFUSED INTERVIEW ()

Reason if given

INTERVIEWEE NEVER HEARD OF ADR AND THEREFORE FEEL UNABLE TO HELP

()

questions at the end of the schedule page 16

1. Have you ever used ADR?

Yes () Go to page 8

No ()

If NO continue

2. Have ADR ever been proposed to you to resolve a dispute?

Yes ()

No () if NO go to page 3

If YES could you answer these questions

Why was ADR not used?

In the following questions could you indicate whether you strongly agree, agree, are neutral, disagree, or strongly disagree

You did not use because ADR was non binding?

1 2 3 4 5

Your lawyer did not recommend it?

1 2 3 4 5

Arbitration was more suitable

1 2 3 4 5

litigation was more suitable

1 2 3 4 5

ADR would reveal too much to the opposition?

1 2 3 4 5

2. Would you consider using ADR to resolve dispute?

Yes () No () don't know ()

Comments

3. Could you say whether you strongly agree, agree, neutral, disagree or strongly disagree with the following statements

ADR reveals too much to the opposition?	1	2	3	4	5
ADR is quicker than litigation	1	2	3	4	5
ADR is quicker than arbitration	1	2	3	4	5
ADR is good for multiple disputes	1	2	3	4	5
ADR is cheaper than litigation	1	2	3	4	5
ADR is cheaper than arbitration	1	2	3	4	5
The weakness of ADR is its non-binding nature?	1	2	3	4	5
ADR is more flexible than the formal systems	1	2	3	4	5

ADR relieves entrenchment in a dispute	1	2	3	4	5
The settlement rate is high when using ADR	1	2	3	4	5
ADR is less threatening than litigation	1	2	3	4	5
ADR is less threatening than arbitration	1	2	3	4	5
There is a need to move away from the adversarial approach					
1	2	3	4	5	
Using ADR is a sign of weakness?	1	2	3	4	5
ADR saves management time	1	2	3	4	5
ADR can be used to create delay?	1	2	3	4	5
ADR is suitable for any size of dispute	1	2	3	4	5
Less money is spent on lawyers when using ADR					
1	2	3	4	5	
Adjudication is the most suitable forum for the resolution of disputes in the construction industry?					
1	2	3	4	5	
The legal profession will hi-jack ADR	1	2	3	4	5

Putting ADR clauses into construction contracts

Do you strongly agree, agree, neutral, disagree or strongly disagree with inserting the following ADR clauses into construction contract

Mediation	1	2	3	4	5
Conciliation	1	2	3	4	5
Adjudication	1	2	3	4	5
Dispute Review Board	1	2	3	4	5
Executive tribunal	1	2	3	4	5

Do you have any comments about ADR clauses put into contracts

Finally could you answer the following questions about legal involvement in ADR

Would you resolve a construction dispute without using a lawyer?

yes () no () don't know ()

Could you give reasons?

Would you use a lawyer in the following procedures? Again from strongly agree to strongly disagree

Mediation	1	2	3	4	5
conciliation	1	2	3	4	5
adjudication	1	2	3	4	5
negotiation	1	2	3	4	5
litigation	1	2	3	4	5
arbitration	1	2	3	4	5
executive tribunal	1	2	3	4	5
dispute review board	1	2	3	4	5

That is all of my questions do you have any comment about the survey?

Are there any questions that you would like to ask me?

Thank you for your time and assistance you representative body will be given a report of the results of the survey

QUESTIONS FOR THOSE WHO HAVE USED ALTERNATIVE DISPUTE RESOLUTION

Could you answer which types of dispute resolution and the number of times you have used it

mediation yes () No () times

conciliation yes () no () times

executive tribunal yes () no () times

dispute review board yes () no () times

adjudication yes () no () times

other?

Could you say which of the following reasons influenced you to use ADR?

requirement of contract clause?

court recommendation

suggestion of other party

type of construction dispute

financial size of dispute

dissatisfaction with arbitration

dissatisfaction with litigation

any other reason?

Please could you say if the were very satisfied, satisfied, neutral, dissatisfied, or very dissatisfied with ADR?

1 2 3 4 5

Did you settle the dispute using ADR

settled

not settled

partially settled

Could you indicate the approximate size of the dispute

Dispute using _____

settled
not settled
partially settled

Could you indicate the approximate size of the dispute

dispute using _____

settled
not settled
partially settled

Could you indicate the approximate size of the dispute

dispute using _____

settled
not settled
partially settled

Could you indicate the approximate size of the dispute

WOULD YOU USE ADR AGAIN TO RESOLVE A DISPUTE?

yes () no () don't know ()

comments

In the following questions could you indicate whether you strongly agree, agree, are neutral, disagree or strongly disagree

You did not use because ADR was non binding? 1 2 3 4 5

Your lawyer did not recommend it? 1 2 3 4 5

Arbitration was more suitable 1 2 3 4 5

Litigation was more suitable 1 2 3 4 5

ADR would have reveal too much to the opposition 1 2 3 4 5

Could you please answer the following questions

Could you say whether you strongly agree, agree ,neutral, disagree or strongly disagree with the following statements

ADR reveals too much to the opposition	1	2	3	4	5
ADR is quicker than litigation	1	2	3	4	5
ADR is quicker than arbitration	1	2	3	4	5
ADR is good for multiple dispute	1	2	3	4	5
ADR is cheaper than litigation	1	2	3	4	5
ADR is cheaper than arbitration	1	2	3	4	5
The weakness of ADR is its non-binding nature?	1	2	3	4	5
ADR is more flexible than the formal systems	1	2	3	4	5
ADR relieves entrenchment in a dispute	1	2	3	4	5
The settlement rate is high when using ADR	1	2	3	4	5
ADR is less threatening than litigation	1	2	3	4	5
ADR is less threatening than arbitration	1	2	3	4	5
There is a need to move away from the adversarial approach	1	2	3	4	5
Using ADR is a sign of weakness?	1	2	3	4	5
ADR saves management time	1	2	3	4	5
ADR can be used to create delay?	1	2	3	4	5
ADR is suitable for any size of dispute	1	2	3	4	5
Less money is spent on lawyers when using ADR	1	2	3	4	5
Adjudication is the most suitable forum for the resolution of disputes in the construction industry?	1	2	3	4	5
The legal profession will hi-jack ADR	1	2	3	4	5

Putting ADR clauses into construction contracts

Do you strongly agree, agree, neutral, disagree or strongly disagree with inserting the following ADR clauses into construction contract

Mediation 1 2 3 4 5

Conciliation 1 2 3 4 5

Adjudication 1 2 3 4 5

D Review Board 1 2 3 4 5

Executive tribunal 1 2 3 4 5

Do you have any comments about ADR clauses put into contracts

Finally could you answer the following questions about legal involvement in ADR

Would you resolve a construction dispute without using a lawyer?

yes () no () don't know ()

Could you give reasons?

Would you use a lawyer in the following procedures? Again from strongly agree to strongly disagree

Mediation 1 2 3 4 5

conciliation 1 2 3 4 5

adjudication 1 2 3 4 5

negotiation 1 2 3 4 5

litigation 1 2 3 4 5

arbitration 1 2 3 4 5

executive tribunal 1 2 3 4 5

dispute review board 1 2 3 4 5

QUESTIONS FOR INTERVIEWEE WHO HAVE NEVER HEARD OF ALTERNATIVE
DISPUTE RESOLUTION

Could you answer the following questions either with strongly
agree, agree, neutral disagree or strongly disagree

Litigation is a satisfactory way to resolve dispute?

1 2 3 4 5

Arbitration is a satisfactory way to resolve a dispute

1 2 3 4 5

Litigation costs too much

1 2 3 4 5

arbitration costs too much

1 2 3 4 5

There is a need to move away from the adversarial system

1 2 3 4 5

The construction industry needs a quick decision

1 2 3 4 5

WOULD YOU CONSIDER RESOLVING A DISPUTE WITHOUT LEGAL ADVISE

YES

NO

DON'T KNOW

Could you give your reasons for this?

PLEASE ASK ALL INTERVIEWEE THESE QUESTIONS AT THE END

1. FOR CATEGORISATION PLEASE COULD YOU INDICATE WHICH CATEGORY
OF ANNUAL TURNOVER WHICH YOU FIT INTO

1. £6 MILLION AND UNDER? ()

2. UNDER £50 MILLION? ()

3. £50 MILLION AND OVER ()

What position do you hold in the company

That is all of my questions do you have any comment about the survey?

Are there any questions that you would like to ask me?

Thank you for your time and assistance your representative body will be given a report of the results of the survey

SEMI-STRUCTURED INTERVIEWS

At the end of each interview the following areas should have been covered.

1. Interview of those respondents who have used ADR. What their experience of it was.
2. Large number of respondents willing to use ADR - 70%
3. Areas not perceived as being appropriate for using ADR.
Factors which make a dispute not appropriate for ADR.
Financial size of dispute.
4. The perceived problems with the non-binding nature of ADR.
5. Attitude to lawyers.
Over 50% agree legal profession will hi-jack ADR.
Over 70% said they would resolve a dispute without legal advice.
Yet negotiation is only process where 40% said they would not use a lawyer.
6. 80% reported that there was a need to move away from an adversarial approach.
7. Rejection of the proposal to use ADR. (For those who had)
25 (13%) reported they had rejected ADR or had it rejected by the other side.
The main reasons given: ADR not binding (56%)
Lawyer did not recommend. (50%)
Litigation more suitable (47%)
8. Suggestions in findings that main contractors are both more knowledgeable and show more confidence in ADR and more likely to use it.
9. Adjudication and the lack of positive support. (Latham)

List of Federations and Associations

Sub/Specialist contractors

National Federation of Painting and Decorating Contractors
Electrical Contractors Association
Thermal Contractors Association
Stone Federation
National Association of Scaffolding Contractors
Plastering and Drywall Contractors
Council for Aluminium in Building
National Federation of Roofing Contractors
British Constructional Steelworker Association Ltd
Steel Window Association
Concrete Structures Group
National Association of Lift Makers
National Association of Plumbing Heating and Mechanical Services Contractors
Partitioning and Interiors Association
Mastic Asphalt Council and Employers Federation Ltd
National Master Tile Fixer Association
Federation of Piling Specialists
Flat Roofing Contractors Advisory Board
Heating and Ventilating Contractors Association

Main Contractors

National Contractors Group
National Federation of Builders

Contractors File 1994

Building 500 1994 December 2

APPENDIX 2

INDICATOR INTERVIEWS.

Page

- | | | |
|----|--|---|
| 1. | Example of letter requesting an interview for the indicator interview. | 1 |
| 2. | Agenda for the indicator interviews. | 2 |

Mike Ankers
Chartered Institute of Building
Englemere
Kings Ride
Ascot
Berks SL5 8BJ

Dear Mike

You may recall that we met at the 1986 meeting of the CIB W-87, when you were I think in the Department of Environment.

I write concerning Penny Brooker, a lecturer in law here, who is undertaking a PhD on the subject of ADR in construction disputes supervised by myself and Richard Fellows, whom you know. We have decided that Penny should talk to the respective professional bodies to obtain their views on the main areas and types of dispute in the construction industry where ADR be relevant, prior to deciding on her sample for the questionnaire survey.

We would be grateful if you could identify someone within the CIOB, officer or member, who could give such views on the basis of their experience and knowledge of the industry. Naturally, it is intended to share the results of the research in due course.

I hope you are able to help by suggesting the right person.

Yours sincerely

Anthony Lavers
Reader in Law.

1. Where are the most common areas and types of dispute in the Construction Industry?

2. What are the general causes of these disputes?

(The aim is to identify if there is a really sensitive axis where dispute occurs and to identify the parties and relationships within the Construction Industry most likely to be in dispute or end up in dispute.)

3. In your experience what is the current state of play with the use of Alternative Dispute Resolution (ADR) in the Construction Industry.

Can you identify the main areas in which it has been employed?

Are there any particular types of disputes using Alternative Dispute Resolution?

If ADR is not being used can you identify any of the factors which may be influencing this?

4. Have you personal experience of using ADR?

5. Are there any factors that you have identified which may help to develop and increase the use of ADR?

6. Are there any factors which you have identified which may hinder the development of ADR?

APPENDIX 3

LEGAL INTERVIEWS.

	Page
1. Example of letter sent to legal advisors requesting an interview.	1
2. Interview agenda.	3

5 March 1996

Jonathan Hosie
Edge and Ellison
18 Southampton Place
London WC 1 2AJ

01865 484916

Dear Mr Hosie,

Survey of the Construction Industry

I am writing to you to request your assistance in the research that I am currently undertaking on dispute in the Construction Industry. I am a senior lecturer in law at the above institution and am in the final stages of a PhD thesis on the perceptions and use of Alternative Dispute Resolution. My supervisor Professor Anthony Lavers has suggested that I contact you in order to complete the final stages of the research.

I have already conducted a major postal survey of main contractors and specialist and sub-contractors. I am enclosing copies of the questionnaires which were issued. I have just recently completed follow up interviews with respondents of the survey and the final task is to investigate the perceptions of the legal profession and legal advisors in the use or not of Alternative Dispute Resolution. The interview would take approximately 40 minutes and would take place at your office. If you are prepared to grant me an interview then I will endeavour to fit in with your timetable. I would like to commence this stage of the research from March 18 1996 to the end of April or the beginning of May 1996. However if necessary I would be able to go beyond this date.

It would perhaps be in order to briefly describe the research design. Early research indicated that the nexus of dispute in the construction industry was between main contractors and specialist or sub-contractors and it was decided

to concentrate the survey on this area. I have been assisted by the federations and associations who have supplied me with their memberships lists. Their support has been with the understanding that I will furnish them with a report of my findings. Part of the research methodology is to conclude with in-depth interviews with representatives of the legal profession who advise the construction industry in disputes.

I will be interviewing representatives of specialist solicitors' practices, barristers who specialise in Construction law and claims consultants. I would appreciate any help that you could contribute to this research. I will in due course be publishing my findings and would be prepared to issue you with the paper which I have agreed to write and submit to the organisations which represent the construction industry. I already have plans to publish part of the research findings in various journals and conferences. Your assistance would be a valuable contribution to this project.

Please do not hesitate to contact me if you have any queries about this research.

Yours sincerely

(Penny Brooker Senior Lecturer in law)

SEMI-STRUCTURED INTERVIEWS

1. GENERALLY ASK FOR THE INTERVIEWEES VIEWS ON ADR
If the interviewee has any experience of using ADR it would be helpful if they could explain the circumstances which led to its use. A description of which processes have been used and the interviewee's general impression on the appropriateness or not of the decision to use ADR.
2. LARGE NUMBER OF RESPONDENTS WHO WERE PREPARED TO USE ADR
Over 70 %
More main contractors than sub or specialist contractors.
3. AREAS THAT THE RESPONDENTS PERCEIVED AS NOT BEING APPROPRIATE FOR USING ADR
The financial size of ADR.
4. THE MAJOR DISADVANTAGE PERCEIVED BY THE RESPONDENTS OF THE SURVEY WAS THE NON-BINDING NATURE OF ADR
Could you explain this fear?
54.5 % agreed it was a weakness of ADR.
5. 90% REPORTED THAT THERE WAS A NEED TO MOVE AWAY FROM THE ADVERSARIAL APPROACH
6. COMMENTS OF RESPONDENTS WHO SAID THAT THEY REJECTED USING ADR OR PROPOSED AND THE OTHER PARTY REJECTED.
56% said that they did not use because it was non-binding.
50% said that their lawyer did not recommend it.
47% said that the formal system was more suitable.
7. SURVEY FINDINGS SUGGESTED MAIN CONTRACTORS WERE MORE LIKELY TO USE ADR AND MORE KNOWLEDGEABLE AND SHOW MORE CONFIDENCE IN ADR
8. ADJUDICATION AND THE LACK OF POSITIVE SUPPORT FROM THOSE SURVEYED
9. ATTITUDE TO LAWYERS
Over 50 % agreed lawyers would hi-jack ADR.

Over 70% said they would resolve disputes without a lawyer.
The interviewees view about the role of claims consultants in construction dispute.

APPENDIX 4

Page 1	Observed means and SE means for the sample population for the "item pool" of attitude statements.
Page 2	Observed means and confidence intervals for the "item pool" of attitude statements for main contractors and sub/specialist contractors.
Page 9	Observed means and confidence intervals for the reasons given for deciding not to use ADR or rejecting a proposal to use ADR.

Observed means and SE means for the sample population for "item pool" of attitudes.

Mean = observed mean

SE = Standard error mean

N= Total sample

Label	Mean	SE	N
Litigation costs too much.	1.49	0.05	202
A quick decision is needed for construction disputes.	1.77	0.05	203
Arbitration costs too much.	1.79	0.06	203
A move away from the adversarial approach is needed.	1.83	0.07	201
Less money is spent on lawyers when using ADR.	1.97	0.06	200
ADR is cheaper than the formal dispute resolution.	2.11	0.06	199
ADR is less threatening than a court of law.	2.11	0.04	199
ADR results in a commercial decision rather than legal definition.	2.13	0.05	200
ADR is quicker than litigation.	2.16	0.06	199
ADR is a consensual approach to dispute resolution.	2.28	0.05	199
ADR is less threatening than arbitration.	2.29	0.04	190
ADR allow you to participate more in resolving the dispute.	2.31	0.05	199
ADR is less confrontational than formal systems of dispute resolution.	2.33	0.05	200
ADR saves management time.	2.38	0.07	200
ADR is quicker than arbitration.	2.39	0.05	199
ADR is non-binding this is a weakness of ADR.	2.39	0.06	198
ADR relieves the effect of the parties becoming entrenched in their positions.	2.42	0.05	200
The legal profession will hi-jack ADR.	2.47	0.06	203
ADR is flexible.	2.48	0.04	200
An independent neutral is needed for the construction industry.	2.63	0.07	202
ADR is not a new process, the construction industry already uses it.	2.66	0.06	199
ADR is suitable for all size of dispute.	2.68	0.05	201
ADR indicates compromise.	2.68	0.06	199
ADR is suitable for any size of dispute.	2.72	0.06	199
ADR is confidential.	2.74	0.05	199
The settlement rate is high when using ADR.	2.77	0.04	201
ADR should be put on a more formal setting.	2.85	0.06	200
Adjudication is the most suitable ADR procedure for the construction industry.	2.86	0.05	200
ADR is good for multiple claims.	2.87	0.05	197
ADR can be used to create delay.	2.90	0.06	199
ADR reveals too much to the opposition.	3.02	0.04	199
ADR is more suitable for claims under £100,000.	3.03	0.06	201
Arbitration is satisfactory.	3.08	0.07	202
ADR is only suitable for "small claims" under £100,000.	3.20	0.07	200
Legal advisors favour ADR	3.32	0.05	198
Using ADR is a sign of weakness.	3.53	0.05	199
Litigation is satisfactory.	3.68	0.07	202

OBSERVED MEANS AND CONFIDENCE INTERVALS FOR "ITEM POOL" OF ATTITUDE STATEMENTS.

**Less money is spent of lawyers when using ADR.
main contractor**

Mean 1.89 95 % CI for Mean (1.72, 2.06)

**Less money is spent of lawyers when using ADR.
sub contractor**

Mean 2.09 95 % CI for Mean (1.89, 2.29)

**ADR is only suitable for "small" disputes under £100,000
main contractor**

Mean 3.28 95 % CI for Mean (3.08, 3.47)

**ADR is only suitable for "small" disputes under £100,000
sub contractor**

Mean 3.13 95 % CI for Mean (2.95, 3.30)

**ADR is cheaper than the formal systems of dispute resolution
main contractor.**

Mean 1.98 95 % CI for Mean (1.82, 2.14)

ADR is cheaper than formal systems of dispute resolution.

Mean 2.29 95 % CI for Mean (2.12, 2.47)

ADR saves management time.

main contractor

Mean 2.28 95 % CI for Mean (2.09, 2.47)

ADR saves management time.

sub contractor

Valid cases: 78.0 Missing cases: 27.0 Percent missing: 25.7

Mean 2.51 95 % CI for Mean (2.30, 2.72)

ADR is suitable for any size of dispute.

main contractor

Mean 2.68 95 % CI for Mean (2.51, 2.89)

ADR is suitable for any size of dispute.

sub contractor

Mean 2.73 95 % CI for Mean (2.56, 2.90)

ADR is not new process the construction industry already uses it.
main contractor

Mean 2.64 95 % CI for Mean (2.47, 2.80)

ADR is not new process the construction industry already uses it.
sub contractor

Mean 2.71 95 % CI for Mean (2.54, 2.87)

ADR is confidential.

main contractor

Mean 2.67 95 % CI for Mean (2.52, 2.82)

ADR is confidential.

sub contractor

Mean 2.83 95 % CI for Mean (2.72, 2.96)

ADR reveals too much of the case to the opposition.

main contractor

Mean 2.98 95 % CI for Mean (2.87, 3.10)

ADR reveals too much of the case to the opposition.

sub contractor

Mean 3.04 95 % CI for Mean (2.90, 3.18)

ADR is a quicker method of dispute resolution than arbitration.

main contractor

Mean 2.39 95 % CI for Mean (2.24, 2.53)

ADR is quicker method of dispute resolution than arbitration.

sub contractor

Mean 2.49 95 % CI for Mean (2.33, 2.65)

ADR is quicker method of dispute resolution than litigation

main contractor

Mean 2.15 95 % CI for Mean (1.98, 2.31)

ADR is quicker method of dispute resolution than litigation.

sub contractor

Mean 2.28 95 % CI for Mean (2.10, 2.47)

ADR is less threatening than court of law.

main contractor

Mean 2.07 95 % CI for Mean (1.96, 2.17)

ADR is less threatening than court of law.

sub contractor

Mean 2.19 95 % CI for Mean (2.07, 2.31)

ADR is less threatening than arbitration.

main contractor

Mean 2.21 95 % CI for Mean (2.10, 2.39)

ADR is less threatening than arbitration.

sub contractor

Mean 2.41 95 % CI for Mean (2.26, 2.56)

ADR allows you to participate more in resolving the dispute.

main contractor

Mean 2.23 95 % CI for Mean (2.09, 2.37)

ADR allows you to participate more in resolving the dispute

sub contractor

Mean 2.37 95 % CI for Mean (2.20, 2.54)

ADR is a consensual approach to dispute resolution.

main contractor

Mean 2.23 95 % CI for Mean (2.11, 2.35)

ADR is a consensual approach to dispute resolution.

sub contractor

Mean 2.31 95 % CI for Mean (2.15, 2.46)

The settlement rate is high when using ADR.

main contractor

Mean 2.77 95 % CI for Mean (2.65, 2.89)

The settlement rate high is high when using ADR.

sub contractor

Mean 2.76 95 % CI for Mean (2.60, 2.92)

ADR relieves the effect of the parties becoming entrenched in their positions.

main contractor

Mean 2.41 95 % CI for Mean (2.27, 2.55)

ADR relieves the effect of the parties becoming entrenched in their positions.

sub contractor

Mean 2.42 95 % CI for Mean (2.25, 2.59)

ADR is commercial decision rather than a legal decision.

main contractor

Mean 2.07 95 % CI for Mean (1.92, 2.23)

ADR is commercial decision rather than a legal decision.

Mean 2.19 95 % CI for Mean (2.04, 2.34)

ADR is good for multiple claims.

main contractor

Mean 2.82 95 % CI for Mean (2.65, 2.98)

ADR is good for multiple claims.

sub contractor

Mean 2.86 95 % CI for Mean (2.73, 2.99)

ADR can be used to create delay.

main contractor

Mean 2.94 95 % CI for Mean (2.77, 3.10)

ADR can be used to create delay.

sub contractor

Mean 2.80 95 % CI for Mean (2.62, 2.97)

Using ADR is a sign of weakness.

main contractor

Mean 3.58 95 % CI for Mean (3.44, 3.72)

Using ADR is a sign of weakness.

sub contractor

Mean 3.47 95 % CI for Mean (3.31, 3.64)

ADR indicates compromise.

main contractor

Mean 2.67 95 % CI for Mean (2.49, 2.84)

ADR indicates compromise.

sub contractor

Mean 2.69 95 % CI for Mean (2.53, 2.86)

Legal advisors favour ADR.

main contractor

Mean 3.34 95 % CI for Mean (3.18, 3.51)

Legal advisors favour ADR.

sub contractor

Mean 3.24 95 % CI for Mean (3.09, 3.39)

The Legal Profession will hi-jack ADR.

main contractor

Mean 2.50 95 % CI for Mean (2.33, 2.67)

The Legal Profession will hi-jack ADR.

sub contractor

Mean 2.51 95 % CI for Mean (2.33, 2.68)

Arbitration is satisfactory procedure for resolving construction disputes.

main contractor

Mean 3.04 95 % CI for Mean (2.85, 3.23)

Arbitration is satisfactory procedure for resolving construction disputes.

sub contractor

Mean 3.08 95 % CI for Mean (2.87, 3.29)

Litigation is satisfactory procedure for resolving construction disputes

main contractor

Mean 3.73 95 % CI for Mean (3.54, 3.92)

Litigation is satisfactory procedure for resolving construction disputes.

sub contractor

Mean 3.73 95 % CI for Mean (3.53, 3.93)

There is a need to move away from adversarial approach.

main contractor

Mean 1.85 95 % CI for Mean (1.65, 2.06)

There is a need to move away from adversarial approach.

sub contractor

Mean 1.80 95 % CI for Mean (1.60, 1.99)

ADR is flexible.

main contractor

Mean 2.37 95 % CI for Mean (2.23, 2.50)

ADR is flexible.

sub contractor

Mean 2.56 95 % CI for Mean (2.44, 2.69)

ADR is less confrontational than the formal systems.

main contractor

Mean 2.26 95 % CI for Mean (2.13, 2.40)

ADR is less confrontational than the formal systems.

sub contractor

Mean 2.39 95 % CI for Mean (2.23, 2.54)

ADR is non-binding this is a weakness.

main contractor

Mean 2.44 95 % CI for Mean (2.25, 2.63)

ADR is non-binding this is a weakness

sub contractor

Mean 2.38 95 % CI for Mean (2.21, 2.56)

ADR is more suitable for dispute under £100,000.

main contractor

Mean 3.06 95 % CI for Mean (2.89, 3.24)

ADR is more suitable for dispute under £100,000.

sub contractor

Mean 3.03 95 % CI for Mean (2.86, 3.19)

Adjudication is the most suitable procedure for the construction industry.

main contractor

Mean 2.85 95 % CI for Mean (2.72, 2.99)

Adjudication is the most suitable procedure for the construction industry.

sub contractor

Mean 2.85 95 % CI for Mean (2.67, 3.02)

Construction industry dispute need a quick decision.

main contractor

Mean 1.88 95 % CI for Mean (1.73, 2.02)

Construction industry dispute need a quick decision.

main contractor

sub contractor

Mean 1.64 95 % CI for Mean (1.50, 1.78)

Construction disputes must be resolved with an independent neutral decision.

main contractor

Mean 2.57 95 % CI for Mean (2.40, 2.75)

Construction disputes must be resolved with an independent neutral decision.

sub contractor

Mean 2.73 95 % CI for Mean (2.51, 2.95)

ADR should be more formal setting.

main contractor

Mean 2.99 95 % CI for Mean (2.82, 3.16)

ADR should be more formal setting

sub contractor

Mean 2.74 95 % CI for Mean (2.55, 2.94)

Arbitration costs too much.

main contractor

Mean 1.73 95 % CI for Mean (1.57, 1.89)

Arbitration costs too much.

sub contractor

Mean 1.94 95 % CI for Mean (1.73, 2.14)

Litigation costs too much.

main contractor

Mean 1.42 95% CI for Mean (1.29, 1.54)

Litigation costs too much.

sub contractor

Mean 1.59 95% CI for Mean (1.41, 1.77)

OBSERVED MEANS AND CONFIDENCE INTERVALS FOR REASONS GIVEN FOR REJECTING A PROPOSAL TO USE ADR.

There was no suitable ADR intermediary.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.26 95 % CI for Mean (2.67, 3.86)

No ADR neutral had enough experience.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.47 95 % CI for Mean (2.93, 4.01) ADR means

Using ADR would have meant a delay in settlement.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.68 95 % CI for Mean (3.13, 4.24)

ADR would have exposed ADR the organisations position to the opposition.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.00 95 % CI for Mean (2.44, 3.56)

There may have been problems enforcing ADR agreements.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 2.53 95 % CI for Mean (2.01, 3.04)

Using ADR may have resulted in settling without discovering the other parties true strength.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 2.84 95 % CI for Mean (2.44, 3.24)

The dispute was an open and shut case.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 2.74 95 % CI for Mean (2.26, 3.21)

There was pressure to settle from the other side.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.32 95 % CI for Mean (2.95, 3.68)

The dispute was too large for ADR.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.32 95 % CI for Mean (2.92, 3.71)

The dispute was too small for ADR.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.53 95 % CI for Mean (3.15, 3.90)

Proposing ADR was a tactic for delay.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.42 95 % CI for Mean (2.96, 3.88)

Arbitration was a more suitable forum.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 2.89 95 % CI for Mean (2.27, 3.51)

The particular dispute was not suitable for ADR.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.00 95 % CI for Mean (2.38, 3.62)

Litigation was a more suitable forum.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 2.89 95 % CI for Mean (2.14, 3.65)

Our legal advisor did not recommend using ADR.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 2.68 95 % CI for Mean (2.08, 3.29)

Our organisation had a lack of knowledge about ADR.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.11 95 % CI for Mean (2.35, 3.86)

Using ADR would have suggested our case was weak.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.42 95 % CI for Mean (2.86, 3.98)

Did not want to use a non-binding procedure.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 2.37 95 % CI for Mean (1.83, 2.91)

Using ADR would have meant a compromise.

Valid cases: 19.0 Missing cases: 210.0 Percent missing: 91.7
Mean 3.11 95 % CI for Mean (2.58, 3.64)

APPENDIX 5

Observed means and SE means for the perceived levels of suitability for different dispute resolution procedure at different financial sizes of dispute.

Page 1 Main contractors with a turnover of £6 million and under.

Page 2 Main contractors with a turnover of over £6 million but under £50 million.

Page 3 Main contractors with a turnover of £50 million and over.

Page 4 Sub-contractors with a turnover of £6 million and under.

Page 5 Sub-contractors with a turnover of over £6 million but under £50 million.

Observed means and SE means for the levels of suitability for different dispute resolution procedures at different levels of financial size for main contractors with a turnover of £6 million and under.

Number of valid observations (listwise) = 23.00

Mean	S.E.	Mean	Valid N Label	Type of procedure at different financial levels.
1.85	.26	27		Conciliation - £50,000-
2.00	.27	26		Litigation - £5million+
2.04	.26	26		Mediation - £50,000-
2.11	.26	27		Adjudication - £50,000-
2.16	.23	25		Mediation - £50,000+
2.27	.26	26		Conciliation - £50,000+
2.35	.26	26		Litigation - £1million+
2.37	.22	27		Adjudication - £50,000+
2.67	.19	27		Arbitration - £250,000+
2.69	.21	26		Conciliation - £250,000+
2.72	.20	25		Mediation - £250,000+
2.74	.28	27		Arbitration - £1million +
2.77	.27	26		Arbitration - £50,000+
2.79	.23	24		Executive Tribunal - £250,000+
2.81	.23	27		Adjudication - £250,000+
2.81	.33	27		Arbitration - £5million+
2.88	.22	26		Litigation - £250,000+
3.04	.30	27		Arbitration - £50,000-
3.04	.26	24		Dispute Review Board - £250,000+
3.08	.29	24		Executive Tribunal - £50,000+
3.09	.29	23		Executive Tribunal - £1million+
3.17	.29	23		Executive Tribunal - £5million+
3.24	.33	25		Executive Tribunal - £50,000-
3.29	.30	24		Dispute Review Board - £50,000+
3.29	.29	24		Mediation - £1million+
3.39	.29	23		Dispute Review Board -£5million+
3.39	.25	23		Dispute Review Board - £1million+
3.48	.25	25		Conciliation -£1million+
3.58	.30	24		Mediation - £5million+
3.59	.23	27		Adjudication - £1million+
3.60	.31	25		Dispute Review Board - £50,000-
3.80	.24	25		Litigation - £50,000+
3.84	.27	25		Conciliation - £5million+
3.96	.29	26		Adjudication - £5million+
4.58	.18	26		Litigation - £50,000-

Observed means and SE means for the levels of suitability for different dispute resolution procedures at different levels of financial size for main contractors with a turnover of over £6 million but under £50 million.

Number of valid observations (listwise) = 21.00

Mean	S.E.	Valid N	Type of procedure and different financial level.
1.35	.10	23	Mediation - £50,000-
1.65	.17	23	Conciliation - £50,000-
1.74	.19	23	Mediation - £50,000+
1.78	.27	23	Adjudication - £50,000-
1.96	.22	23	Adjudication - £50,000+
2.00	.21	22	Conciliation - £50,000+
2.13	.30	24	Arbitration - £5million+
2.18	.33	22	Executive Tribunal - £50,000-
2.21	.36	24	Litigation - £million+
2.29	.22	24	Adjudication - £250,000+
2.30	.25	23	Arbitration - £1million +
2.42	.22	24	Mediation - £250,000+
2.52	.33	23	Litigation - £1million+
2.59	.33	22	Dispute Review Board - £50,000-
2.75	.26	24	Conciliation - £250,000+
2.78	.24	23	Arbitration - £250,000+
2.82	.31	22	Executive Tribunal - £50,000+
3.00	.30	22	Dispute Review Board - £50,000+
3.04	.28	23	Litigation - £250,000+
3.13	.28	23	Adjudication - £1million+
3.17	.31	23	Executive Tribunal - £250,000+
3.22	.29	23	Dispute Review Board - £250,000+
3.35	.26	23	Conciliation -£1million+
3.43	.33	23	Adjudication - £5million+
3.48	.27	23	Arbitration - £50,000+
3.64	.28	22	Executive Tribunal - £1million+
3.65	.21	23	Mediation - £1million+
3.70	.35	23	Arbitration - £50,000-
3.77	.28	22	Dispute Review Board - £1million+
3.86	.32	22	Dispute Review Board -£5million+
3.87	.25	23	Litigation - £50,000+
4.14	.27	22	Executive Tribunal - £5million+
4.26	.23	23	Conciliation - £5million+
4.30	.25	23	Litigation - £50,000-
4.35	.23	23	Mediation - £5million+

Observed means and SE means for the levels of suitability for different dispute resolution procedures at different levels of financial dispute for main contractors with a turnover of over £50 million.

Number of valid observations (listwise) = 23.00

Mean	S.E.	Valid N	Type of procedure at different financial level.
1.58	.17	26	Litigation - £million+
1.63	.21	27	Conciliation - £50,000-
1.85	.24	27	Arbitration - £5million+
1.88	.26	25	Mediation - £50,000-
1.88	.19	26	Litigation - £1million+
1.92	.29	26	Adjudication - £50,000-
2.00	.26	25	Mediation - £50,000+
2.04	.22	27	Conciliation - £50,000+
2.04	.23	26	Adjudication - £50,000+
2.07	.22	28	Arbitration - £1million +
2.52	.28	25	Mediation - £250,000+
2.69	.26	26	Arbitration - £250,000+
2.69	.28	26	Adjudication - £250,000+
2.70	.25	27	Conciliation - £250,000+
2.72	.21	25	Executive Tribunal - £250,000+
2.76	.23	25	Executive Tribunal - £50,000+
2.76	.23	25	Litigation - £250,000+
2.96	.27	25	Mediation - £1million+
3.12	.31	25	Executive Tribunal - £50,000-
3.16	.25	25	Dispute Review Board - £250,000+
3.16	.26	25	Executive Tribunal - £1million+
3.19	.26	26	Conciliation -£1million+
3.20	.32	25	Mediation - £5million+
3.24	.23	25	Dispute Review Board - £50,000+
3.28	.30	25	Dispute Review Board - £50,000-
3.36	.26	25	Dispute Review Board - £1million+
3.42	.25	26	Adjudication - £1million+
3.48	.30	25	Executive Tribunal - £5million+
3.52	.28	25	Dispute Review Board -£5million+
3.58	.28	26	Arbitration - £50,000+
3.65	.30	26	Conciliation - £5million+
3.67	.30	27	Adjudication - £5million+
4.00	.22	25	Litigation - £50,000+
4.19	.30	26	Arbitration - £50,000-
4.52	.22	25	Litigation - £50,000-

Observed means and SE means for levels of suitability for different dispute resolution procedures at different financial sizes of dispute for sub/specialists contractors with a turnover of £6 million and under.

Number of valid observations (listwise) = 25.00

Mean	S.E. Mean	Valid N	Type of procedure at financial level.
1.81	.18	31	Conciliation - £50,000-
2.03	.16	29	Conciliation - £50,000+
2.15	.23	27	Arbitration - £1million +
2.19	.22	31	Mediation - £50,000-
2.29	.26	31	Adjudication - £50,000-
2.30	.29	27	Arbitration - £5million+
2.32	.19	28	Arbitration - £250,000+
2.36	.22	28	Adjudication - £50,000+
2.36	.20	28	Mediation - £50,000+
2.37	.31	27	Litigation - £million+
2.55	.24	29	Dispute Review Board - £250,000+
2.57	.21	28	Conciliation - £250,000+
2.62	.17	29	Mediation - £250,000+
2.64	.26	28	Litigation - £1million+
2.71	.23	28	Dispute Review Board - £50,000+
2.73	.25	30	Executive Tribunal - £50,000-
2.74	.20	27	Executive Tribunal - £50,000+
2.79	.23	28	Executive Tribunal - £250,000+
2.87	.25	31	Dispute Review Board - £50,000-
2.96	.21	28	Arbitration - £50,000+
2.96	.25	28	Adjudication - £250,000+
3.00	.25	26	Executive Tribunal - £1million+
3.00	.27	27	Dispute Review Board - £1million+
3.04	.28	28	Adjudication - £1million+
3.04	.21	27	Mediation - £1million+
3.14	.25	28	Litigation - £250,000+
3.15	.25	27	Conciliation -£1million+
3.16	.30	25	Executive Tribunal - £5million+
3.23	.30	26	Dispute Review Board -£5million+
3.23	.27	26	Mediation - £5million+
3.35	.33	26	Adjudication - £5million+
3.38	.29	26	Conciliation - £5million+
3.42	.28	31	Arbitration - £50,000-
3.55	.23	29	Litigation - £50,000+
3.87	.25	30	Litigation - £50,000-

Observed means and SE for levels of suitability for different types of dispute resolution procedures at different financial levels of dispute for sub/specialist contractors with a turnover of under £50 million but over £6 million.

Number of valid observations (listwise) = 21.00

Mean	S.E.	Valid Mean	N	Type of procedure at financial level.
1.83	.27	24		Adjudication - £50,000-
1.87	.24	24		Conciliation - £50,000-
1.96	.29	25		Litigation - £million+
2.08	.25	25		Arbitration - £1million +
2.09	.30	23		Mediation - £50,000-
2.20	.28	25		Arbitration - £5million+
2.21	.28	24		Adjudication - £50,000+
2.39	.30	23		Mediation - £50,000+
2.40	.25	25		Litigation - £1million+
2.42	.28	24		Conciliation - £50,000+
2.42	.26	24		Arbitration - £250,000+
2.67	.33	21		Dispute Review Board - £50,000-
2.72	.27	25		Adjudication - £250,000+
2.77	.34	22		Executive Tribunal - £50,000+
2.77	.30	22		Executive Tribunal - £50,000-
2.79	.26	24		Arbitration - £50,000+
2.86	.33	21		Dispute Review Board - £50,000+
2.86	.32	22		Executive Tribunal - £250,000+
2.96	.24	24		Mediation - £250,000+
3.00	.24	25		Conciliation - £250,000+
3.21	.28	24		Litigation - £250,000+
3.33	.30	21		Dispute Review Board - £250,000+
3.50	.31	24		Arbitration - £50,000-
3.50	.31	24		Adjudication - £1million+
3.55	.34	22		Executive Tribunal - £1million+
3.58	.35	24		Adjudication - £5million+
3.68	.37	22		Executive Tribunal - £5million+
3.79	.28	24		Conciliation -£1million+
4.00	.28	21		Dispute Review Board - £1million+
4.04	.27	24		Conciliation - £5million+
4.05	.32	21		Dispute Review Board -£5million+
4.09	.21	23		Mediation - £1million+
4.13	.20	24		Litigation - £50,000+
4.35	.21	23		Mediation - £5million+
4.50	.17	24		Litigation - £50,000-

APPENDIX 6

PAPERS.

- Page 1. Will ADR follow the direction of arbitration into legalism and formalism?
Brooker P. Ninth Annual Conference of Association of Researchers in Construction Management. (ARCOM)
- Page 14 Perceptions of the role of ADR in the settlement of construction disputes: Lessons for the UK from the US experience.
Proceedings of the International Conference for DART. (Dispute and Avoidance Resolution Taskforce.)

WILL ADR FOLLOW THE DIRECTION OF ARBITRATION INTO LEGALISM AND FORMALISM

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Keywords

Litigation, arbitration, ADR (Alternative Dispute Resolution), legalism, formalism, "common law", "Civil litigation", "adversarial system", mediation, consensus and "forced procedures".

Summary

Historical research (Abel 1982, Auerbach 1983, Holdsworth 1924) has indicated that when there is dissatisfaction with the formal legal system then alternatives will be introduced. Research also indicates that these alternatives are assimilated eventually by the formal system, which in the UK is the state provided litigation process. Arbitration was originally developed to provide a flexible, cheaper and speedier resolution to litigation. However it has become formalized and legalized and closely resembles the court procedure. The general dissatisfaction with Arbitration, held by those involved in dispute in the Construction Industry, has led to a drive from diverse sectors to consider alternative processes. By following the same path as arbitration, that of formalism and legalism, the effectiveness of ADR, its flexibility and costs, may be lost. Interested parties are recommending that ADR clauses should be implemented into standard forms and that the disputing parties should be directed towards mediation before continuing litigation, through incorporating court-annexed mediation into the formal system. This dichotomy between the choice of consensual or "forced" procedures may be an obstacle to the development of ADR and may result in the assimilation of these new processes into the formal system.

Introduction

To discuss any Alternative Dispute Resolution Process (ADR) it is necessary to identify what they are an alternative to. This paper looks at civil litigation which is the formal legal process of common law countries such as England and America. Civil litigation uses the adversarial system of litigation. This system has often been perceived as inappropriate by some sectors of society for the resolution of their disputes and since the Middle Ages there has been a continuous experimentation with alternatives. This paper charts the assimilation into the formal system of the early experiments with ADR both in England and America and identifies the possible reasons for this fate. A more detailed examination of the history and development of Arbitration is undertaken to identify some of the factors involved in its progress from a speedier, flexible and less formal technique into the formalized and legalized

procedure that it is perceived as today. Finally the early development of ADR in this country will be examined and a comparison drawn to the development of arbitration.

Historical Review of ADR. **Civil Litigation and the Adversarial System.**

Arbitration was just one of many ADR processes developed as an alternative to the formal system of civil litigation which is the legal process for resolving disputes adopted by countries whose origins are derived from the Anglo-Saxon Common Law. Litigation is commonly referred to as the "adversarial system". Adjudication takes place under a defined jurisdiction which consists of formal rules of procedure and is governed by substantive law. Each side may produce witnesses and experts who present their case and can be examined, cross-examined and challenged by the opposing side. The basic philosophy underpinning the adversarial system is that the best means of finding the truth is through the testing of the various versions of the conflict. Each party to the dispute is required to prove his or her claim and the lawyers function is to persuade the judge and/or jury as to the rightness of the clients claim.

Criticism of the Adversarial System.

Criticism of the adversarial system are that it is a lottery which creates gamesmanship, delays and increased work. The adversarial approach has mystified the judicial process, alienating people and constraining them from turning to the court.(Jacobs 1985)¹ It has been described as "threatening, inaccessible and exorbitant".(Auerbach 1983)²

It was to avoid the litigation process that arbitration evolved yet it is now perceived to be as formalized and legalized as the very process that was wished to be avoided. The mimicking of the court procedure with the adoption of the adversarial system and the increasing complexity of the process has come under attack from many sides. It is commonly believed that the rigid observance of court like procedures leads to delays in time and adds to the costs. As Auerbach comments;³

"Once an adversarial framework is in place, it supports competition and aggression to the exclusion of reciprocity and empathy."

The proponents of ADR claim that these concepts of reciprocity and harmony are its greatest qualities and the basis for its effectiveness. They are critical of litigation with its specialized language, confusing procedure and dependence on the professional lawyer. Disputing parties within the Construction Industry have made similar complaints about arbitration which, it has been stated, has been "hijacked"⁴ by the legal profession. Flood and Caiger (1993)⁵ associate the growth of lawyer involvement to the development of the standard form of contract in the Construction Industry. They recognized that lawyers involved in this field have sought to juridify arbitration in order to protect their position and authority from the non-lawyer: the architects, surveyors and engineers who are also involved in the arbitration process.

They conclude that lawyers are in a singular position;

*"...because of their power over the discourse of legalism. They have the power of appropriation."*⁶

Early Experiments in ADR in England and America

Looking for alternatives to the formal system is not a new phenomenon within our legal history nor other Common Law jurisdiction. Dissatisfaction with the Common Law courts led to the development of the Courts of Equity. Holdsworth(1924)⁷ described how the courts of the Law Merchant developed, which was outside the jurisdiction the courts of the common law and equity. These courts dispensed similar laws and codes throughout Europe to cater for the merchants who were a distinct class of people.

From the beginning of the Middle Ages separate classes had perceived the need for alternative forums for the resolution of their disputes. However by the seventeenth century Holdsworth⁸ noted that the Common Law courts had appropriated and absorbed the jurisdiction of the commercial cases. This seizure may have been either the jealousy of the common law (during the Middle Ages the Judges fees were paid for by the litigants⁹) or through the transformation to a centralized national legal system.(Ferguson 1980)¹⁰

The American Experience.

America mirrored the English experience. Auerbach¹¹ documents a history of small communities from the Dutch settlers in 1646, through the Quakers, the Mormons, the Mercantilists to the Jewish Immigrants of the twentieth century, all rejecting the formal legal system. The success of these non-legal methods was due a common community image but they were destined not to survive. The progression to the Rule of Law was, Auerbach believes an inevitable result of industrialization and the force of the law being asserted to protect the new social order.

The twentieth century has seen a renewed interest in the search for alternative dispute settlement. The 1960's in America saw the empowerment of the community as a theme of political reform. There were suggestions of neighbourhood reforms and "reconciliation boards". These did not survive the riots in the ghettos. Britain in the early to mid 1980s experimented with its own community mediation schemes. (Marshall 1985)¹² The success of these schemes seem to be consistent with those of America. Participation is related to the amount of coercion by the formal system. A scheme is powerless if people do not want to participate.(Young 1989)¹³

Recent Developments in ADR in England and America.

In America in the 70s and 80s there was a resurgence of interest in alternative forms of dispute resolution. Several factors have been identified to explain this

interest.(Auerbach 1983) The complexity of modern life has led to the potential for more disputes. The church, family and the neighbourhood's traditional role in informal dispute resolution declined when their influence on people's lives diminished. The Government has increased its involvement in the lives of its citizens and there are an increasing number of disputes between them. Finally there is also a perceived notion that people have become more litigious. However researchers have "exploded this myth".(Alschuler 1988, Galanter 1983)¹⁴ The litigation rate in Colonial America was four times higher in some places than the rate in the twentieth century. Despite the perception that litigation in America is higher than in other countries, Markesinis (1990)¹⁵ demonstrates that the rate is little different from England. Alschuler comments that the problem of litigation in the formal system is an inadequate supply of adjudication rather than excessive litigiousness of the American people. The formal system has become more expensive and less available.

Britain has not escaped criticism in the area of costs and delays for civil litigation. Zander (1988)¹⁶ appraised The Civil Justice Review in 1985 which examined the main classes of civil business. The Consultative paper covering commercial cases indicated that there was a great demand for the specialized skills of the judges. The number of writs issued in 1986 had risen to over 2000 compared to 913 in 1979. However the perception held of lengthy pleadings, long trials and a vast involvement of legal personnel was found to be inaccurate. A perception that perhaps remains nevertheless. Flood and Caiger (1993)¹⁷ report that the delay for the London Official Referees' Court, which mainly hears construction disputes, is about 15 to 18 months.

The Construction Industry in the UK has similarly been criticized for its litigious nature and the frequency of disputes. Fenn (1991)¹⁸ investigated the number of cases tried in the Official Referees Court, 1880-1986. He concluded that the overall figures did not indicate an increasing level of construction litigation however there was a striking increase in the number of cases brought before the court which were not tried as a result of settlement before the court date. He believes the figures support the perceptions that construction is contentious and disputes are on the increase. These perceptions have created an preoccupation with ADR which is evident in current literature.

In America the dissatisfaction with the formal system led to what has been described as an "explosion" of ADR and England now appears to be following this lead. What the early history of experimentation with alternative procedures has shown is that they have eventually been assimilated by the formal system whether through jealousy or the need to protect the growth of the capitalism through the Rule of Law.¹⁹ The present dissatisfaction with arbitration and litigation is renewing an interest in ADR. This interest is being propagated within the Construction Industry. What will the States' response be to the new processes? Will ADR receive the same treatment as arbitration and become part of the formal and legal system?

Historical Development of Arbitration.

Authurs (1984)²⁰ describes how, following the transformation of English society due to the industrial revolution, the ordinary courts of law gained ascendancy

over what had been a long history of legal pluralism. Adjudication had previously taken place in other arenas in local courts, by government bodies and by arbitrators employing rules and norms which were different from the common law. From about 1830 this diversity of dispute systems gave way to national control and centralization. However arbitration, the origins of which have been traced back to the influence of the Roman Law²¹, endured and developed. Arthurs submits it was appropriated by a powerful lawyers' lobby²², which through legislation and the common law controlled the review and enforcement of awards and developed the format of procedures. Finally the lawyers themselves became arbitrators.

The constraints of this paper make it impossible to examine every piece of legislation or case decision concerning arbitration. Nonetheless it is feasible to look at some of the milestones in its development and identify some of the factors involved which allowed it to flourish, albeit it in a direction unintended from the outset. Lane (1986)²³ charts the role of the Legislature and the Courts in the development of arbitration which is summarized below. What he describes is a gradually increasing involvement by the formal legal system. There is already evidence that the formal system is showing interest in ADR which is in its early stages of development. The question is how will this involvement influence the evolution of ADR?

Legislative Involvement

Arbitration gained legitimacy in 1698 when Parliament recognized the practice in "An Act for determining differences by arbitration". Following the Act the court could enforce an arbitration agreement if the parties had agreed it should be a Rule of Court. The formal system was lending its coercive power to arbitration. There was no further legislative interference until 1833 when the power of the arbitrator was enhanced. A party who had agreed to make a submission to arbitration a rule of court could not now rescind the reference without the leave of the court. The Act also gave the court power to order the attendance of witnesses to an arbitration where the submission had been made a Rule of Court and those witnesses could be examined under oath. If they gave false evidence they could be prosecuted and punished for perjury. The power of the formal system was permitted to be utilized by the informal one. The authority of arbitration was increasing. It was being given a legal bite.

Its power was further increased by the Common Law Procedure Act of 1854. If the parties had agreed to arbitrate then the courts could stay proceedings until the arbitration had taken place. This prevented disputants from ignoring their original agreement and also increased the legality of arbitration.

As noted by Lane²⁴ this meant that the courts were still "seised" of the matter. The courts could end litigation and force the parties to arbitrate but the effect of staying the proceeding was that the courts (the formal system) still retained their interest. Arbitration was not allowed to "oust the courts jurisdiction". The courts and the legislature have always been vigilant in protecting this. It was to be a feature in the battle over the Special Case Procedure.

Ousting the Courts Jurisdiction.

The Special Case procedure had been introduced by the 1854 Act and provided for further control by the Judges. The arbitrator was able to set out the facts of an award and then put the case to the court to resolve any legal query. However the parties could not compel the arbitrator to state a case nor could they exclude the court from setting aside any award which had revealed an error of fact. The formal system was keeping control over the informal one and ensuring that their position of authority was not challenged.

A new stated case procedure was introduced by the 1898 Arbitration Act, which permitted the arbitrator to consult the court on any question of law arising during the reference. It was to bring the court into direct conflict with arbitration. The question which came before the courts was whether the parties could exclude this power. If licence was given to do this it would have ousted the courts jurisdiction by giving finality to the arbitrator's award. The reaction of the court was decisive in this threat to their power. The judgements in Czarnikow v. Roth Schmidt and Company [1922] 2 K.B. 478 conclusively ruled that to yield to this would create two systems of law and no section of the community was to be outside the control of the formal system.

The result of this decision was to bring arbitration into disrepute when it was exploited to prolong judgement in order to avoid payment. The perceived effect was well documented in the Commercial Court Committee's report on arbitration in 1978²⁵. England was losing out as one of the leaders in international dispute resolution. Resulting in a loss in revenue to the national economy. The 1979 Act remedied the situation by abolishing the stated case procedure.

What the early legislation demonstrated was that arbitration had been given an increasing legal status but it also provided for a symbiotic relationship with the formal system. It is this relationship that has moulded and created the present structure of arbitration. Neither Parliament nor the courts were prepared to give arbitration or the arbitrators the wide powers that the court had. The process was to be controlled and overseen by the formal system.

Court Involvement.

Prior to the passing of the 1698 act the courts had not been particularly concerned with commercial matters their business was mainly involved with land. Once arbitration had been given a legitimacy through legislation the courts began to scrutinize it.²⁶ Parker (1959)²⁷ identifies three theories. First; jealousy, there was a natural desire to keep all adjudication within the courts sphere. Secondly; there was a fear of a new system of law developing to challenge the common law. Finally; the fact that the litigants required the support of the courts in their arbitrations would have a price.

Parker shows that early court intervention was limited to whether the arbitrator had acted within the submission, that is jurisdictional review but after 1698 the cases indicate that the courts were concerned with procedure and natural justice. If arbitration was to use the weight of the law and its coercive powers it was to pay for

this. Legitimacy had its price. The eventual development was that the judges set aside awards for a mistake of law if it appeared on the face of the award or in the reasoned judgements.²⁸ The courts were reserving the right to set aside the decisions of arbitrators and were preventing the development of a separate legal system of arbitration law.

Relinquishing of the Power of the Courts.

The response of the arbitrators was simply not to give reasoned awards and to give little information on the face of the award. To remedy this the 1979 Arbitration Act s1(1) abolished the High Court power to set aside awards with errors of law on their face. The lack of giving reasons had made English arbitral awards different to most other countries and had led to the possibility of objections to their enforcement abroad on the grounds that they may be "unmotivated"²⁹. The Commercial Court Committee knew of no case where this had happened. However they still recommended the removal of this power and the introduction of a new appeals procedure by abolishing the stated case in order to make England more attractive for international arbitration.

The Courts Response.

Lane believes the courts have been inconsistent in their approach to arbitration since the 1979 Act. The House of Lords gave a narrow reading to section 1(4)³⁰, which implemented the new appeal system. The section had appeared to give the courts a wide discretion yet exacting guidelines were issued by the House in the Nema, in order to curtail the power of the courts and shorten delays. Conversely a year later the House of Lords did little to augment arbitration when it failed to give arbitrators the matching powers that a judge had to dismiss a claim for want of prosecution.³¹ The situation has since been remedied by statute³². The effectiveness of this is yet to be tested.

Finally, as far as case law is concerned, the Court of Appeal decision in Northern Regional Health Authority v Crouch Construction Ltd 1984 QB 644 has apparently given to arbitrators more power than a judge would have. Some arbitration clauses give the arbitrator the power to open up and revise any certificate, opinion, decision, requirement or notice of the architect, as the JCT 80 contract does. The "Crouch" decision has held that the court does not possess the same power to substitute its opinion for that of the architect. As a result of this decision many disputes under the JCT contracts must now be taken to arbitration. Lane³³ points out that the decision was an acceptance of the reality that the courts are now unable to cope with the demand for their service. In other words the courts have severed themselves from this arena of dispute and left it in the sphere of arbitration. This increasing power of arbitration can be viewed as the growing respect the formal system has for the process or another indication that it is merely regarded as a appendage to the formal system.

Why Businessmen Chose Arbitration.

Despite the equivocal attitude the court have shown towards arbitration, business people have constantly given their support and Construction is one of the bigger sectors of industry to use its services.(Flood and Caiger 1993)³⁴ Ferguson(1980)³⁵ identifies diverse factors involved in this patronage; The legal procedures and rules were perceived as inappropriate for the settlement of their differences. There was a preference for the dispute to be heard by men experienced in the area using "natural rather than legal procedures."³⁶; The cost of litigation influenced the choice of arbitration; Another incentive was that litigation in the mid-nineteenth century involved trial by jury which created scepticism.³⁷ The Juries Act of 1870 meant that new classes of citizens were represented. Business people felt they did not have the knowledge to understand the evidence before them. This perception led to a proposal to the Judicature Committee in 1874 for a panel to hear commercial cases with one judge and two merchants. This was firmly rejected.³⁸ The legal profession were not prepared to share their authority; Another complaint was that case a could turn on a legal point and there was a demand that the decision should be made with reference to commercial customs. The Judicature Committee again rejected the proposal asserting that it would lead to uncertainty and escalating litigation.³⁹

This failure of the legal system to respond to the complaints of commerce led the business world to turn to arbitration. Ellenbogen(1952)⁴⁰ postulates the view that the commercial world feel more acutely that the law is rigid and failing to serve business when there is growth in the economy. When it is in decline then business people have more to lose and are more likely to stand on their legal rights. The same opinion has been held in connection with the likely success of ADR within the Construction Industry at this present time. A leading law firm noted that its clients were opting to litigate in order to gain time and would be uninterested in employing speedier methods of resolution.⁴¹ Flood and Caiger (1993)⁴² report on the decline of the top ten companies profits. Since the late 1980's there has been a startling decrease in profits and some companies, they report, were forecasting zero profits for 1992. Finance will always be a driving factor in the likely success of new processes. At present the construction Industry is in a depression this may prevent the development of ADR.

What Direction is ADR Taking?

Currently ADR is the "buzz" word of the 90's. There is immense interest partly due to the perceptions that arbitration is not fulfilling its original objectives in providing a quick, cheap and fairer alternative to litigation. The Construction Industry has been targeted by firms offering the new ADR services. Hoare et al(1992)⁴³ provided evidence to support these perceptions. 80% of those surveyed, who had experienced arbitration, said their future relationship was affected. There were reports of gamesmanship used to influence the resolution. Larger firms were putting pressure on smaller firms by drawing out the proceedings. Blackmail was suggested in the form of no more invitations to tender if claims were pursued. The conclusion of the survey was that many of the factors were perceptions which the parties were capable of changing. Analogous to this is that attitudes are now being created towards ADR

and these may ultimately bias its potential either positively or negatively. Perceptions are capable of influencing the future development of any new processes.

Construction Industry-History of Complaints.

Complaints about arbitration are not new. A cursory examination of The Journal of the Institute of Arbitrators, which was first published in 1915, reveals that there were grievances from the earliest days about delays and costs and the involvement of the legal profession, many originating from the Construction Industry. It would be too simplistic to place all the blame at the feet of the legal profession. To some extent both arbitration and the law have responded to the demand made by the users. As witnessed earlier, the formal system gave its support when it was needed but did exact a price.

The involvement of lawyers and legal counsel may have resulted in the courtroom practices that have been adopted in the arbitration procedure. Others have pointed out that this is not an unnatural occurrence since this is the format that lawyers have been trained in and feel most comfortable with. As early as 1920 the newly formed and developing profession of Arbitrators decried the need for the parties to involve the legal profession in the actual arbitration.⁴⁴ The arbitrator was trained in law and able to resolve the point without the need for legal representation. A recommendation that was not followed and clearly a problem that has been going on for nearly 90 years. The Arbitrators' profession has not been able to keep out the legal profession, which has influenced the way arbitration developed. (Flood and Caiger 1993). A key consideration may be which profession will control and influence ADR.

Professional Involvement.

In North America professionalism of the practice of mediation has become an issue. The newly fledged profession claims that the development of standards and qualifications are to protect the public. Critics suggest that this is a cover to protect those established in the practice from newcomers.⁴⁵ There is opinion that professionalism will result in increased costs and decreased availability. The contention is that no single body is yet experienced enough to give direction or limit others from participation.⁴⁶

Already the official representatives of the solicitors, the Law Society and the Bar Council have submitted their views on ADR. The legal professions are positively interested in the new procedures. The General Council of the Bar Committee under the chairmanship of Lord Chief Justice Beldham recommended that a court-based mediation service should be set up and that the mediators involved should be lawyers of at least seven years experience. Roberts (1992,93)⁴⁷ has criticized this on a number of grounds; There was no recognition of the proponents of ADR who have vested interests; government who wish to reduce its spending on the courts; the judges who wish to relieve the present amount of business; the professional groups who want to secure new work; the disputants who want a cheaper resolution methods.

Roberts further criticizes the use of mandatory ADR which has been the subject of criticism in America.⁴⁸ The arguments centre around the implication that there are more deep-rooted, underlying objectives by those in power to control and manipulate the new ADR mechanisms and the people who use them.⁴⁹ This has been borne out by the experiences of arbitration, with the increasing involvement of the formal system which eventually produced a structure which is very different from its early origins.

Conclusion Legal Monopoly and Formalism.

The spectre of a legal monopoly in England has been raised by Robertshaw(1992)⁵⁰ and Roberts (1992,93) The groups offering ADR training are predominately made up of lawyers.⁵¹ Both sections of the legal professions have indicated their interest. England is not as far down the track as America, nevertheless, there are companies already offering training in mediation and these groups have substantial lawyer involvement. If the same bodies which helped influence the legalism of arbitration are now influencing ADR then the prospect must be there that ADR will follow in the same direction.

Legal involvement accelerated in arbitration when the process was legitimized and when arbitration needed the formal system to enforce its awards and its authority. The proponents of ADR all exhort the incorporation of ADR clauses into contracts in order to promote its use. This will lead to litigation to test their validity, a path that arbitration travelled down.

Stipanowich and Henderson (1992)⁵² investigated the role of mediation and mini-trial in construction disputes in the United States and demonstrated that where procedures are "forced" either through the use of ADR clauses or by court direction then the success rate of settlement diminishes. Where parties agreed to ADR, settlement or partial settlement occurred most of the time (63.1% and 9.1% respectively or 27.7% did not settle). When the parties were "forced" to use ADR then 43% failed to settle. The claims from the advocates of ADR are that the settlement rates are high and this is achieved because it is non-binding and consensual yet they recommend the implementation of "forced" procedures. Arbitration is a directed procedure and ADR may indeed follow the same route.

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**PERCEPTIONS OF THE ROLE OF ALTERNATIVE DISPUTE
RESOLUTION IN THE SETTLEMENT OF CONSTRUCTION DISPUTES:
LESSONS FOR THE UK FROM THE US EXPERIENCE**

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Background to the research - the 1992 UMIST Conference

It is almost exactly two years since the University of Manchester Institute of Science and Technology (UMIST) held the First International Construction Management Conference on Construction Conflict Management and Resolution (the UMIST Conference). That conference may be regarded as something of a water-shed in the study of construction conflict and its management, certainly in the UK and perhaps more widely. For, amongst other achievements, it provided a forum in which could be demonstrated two important and connected truths.

First, conflict does not manifest itself uniformly or simultaneously in the construction industries of all countries. The industries of some nations have a longer and perhaps more profound experience of conflict, or at least of formalised disputes, than others. For example, in Hong Kong it was noted that "major conflicts in the construction industry are a relatively recent phenomenon, and have evolved from a restricted base" (Houghton, 1992). This is characteristic of the situation in South-East Asia and the business practices, grounded in cultural tradition, of that region. A decade earlier a Singaporean commentator described "our Chinese mentality" which "abhors any attendance in the Court of Law", based as it is on the concept of keeping or saving 'face': "maintaining one's face" or 'giving one's opponent face' have much to do with the tendency not to bring disputes into the open" (Koh, 1981). Lest it be thought that this is a function of size (although neither industry is small) similar features can be observed in the Japanese construction industry: "high incidence of disputes and conflict does not feature - Japanese face fosters trustworthiness" (Fellows, 1992). "The Japanese cultural heritage of non-argument is probably a contributory factor in preventing potential conflicts involving Japanese firms" (Nicholson, 1992). But the situation is not therefore static in its differences between countries. A cyclical pattern may be observed. Eugene Connors originated the concept that "ideas, including dispute resolution ideas, pass through four evolutionary phases" (Connors, 1991). The large-scale intervention of contractors and consultants from Europe, North America and Australia in the Far Eastern market has been a factor in hardening attitudes and changing practices. Houghton commented that "throughout South East Asia, with states such as Hong Kong and Singapore in the forefront, there is a tendency to follow the current western thinking, and to have disputes resolved by third party intervention" (Houghton, 1992). Evidence to support this contention, if it is needed, can be found from the increasing presence of major reported South East Asian construction cases in the pages of the Building Law Reports such as Wharf

Properties v Eric Cumine Associates (1991) 52 BLR 1 from Hong Kong and Hyundai Engineering v Active Building (1988) 45 BLR 62 from Singapore.

The first lesson of the UMIST conference, then, was that experience of construction conflict and its resolution is at different stages in different countries.

The second related lesson is that benefit may be obtained in understanding the situation currently obtaining and likely to develop in one country by studying the experience of others. Certainly there had been individual examples of mechanisms or techniques being derived from other countries before that time. Thus the use of a Dispute Resolution Adviser on the refurbishment contract for the Queen Mary Hospital in Hong Kong was based upon the US Army Corps of Engineers' Dispute Review Boards (Wall, 1992).

It is not contended that simplistic packaged exporting of one nation's ideas or mechanisms to another will often be appropriate. An attraction within one industry or jurisdiction may fade or disappear altogether within another, for a variety of reasons. To transplant an idea from one system to another can be as dangerous as a simplistic translation between languages. Thus the search for a compromise and its achievement may be a worthy objective in the UK and US construction industries but in the French industry 'une compromission' would be a "dishonest opportunistic or shady deal" while 'un compromis boiteux' would suggest a flawed result, a lose-lose outcome with which neither party was satisfied (Leeds, 1992).

Nevertheless, the UMIST Conference highlighted the potential value of studying the dispute experience of other construction industries and the resolution methods employed in other jurisdictions.

The focus of study

The above two lessons from the UMIST Conference were, it is submitted unavoidable. But individual researchers are rarely in a position to take a global view. Such a task would be appropriate to a Working Commission or Task Group of the International Council for Building Research (CIB) working over at least a five year period. Indeed, it is to be the task of CIB's TG 15 on Construction Conflict: Management and Resolution. For UK researchers to obtain insight as efficiently and reliably as possible, it seemed desirable to focus study on an industry with points of comparison and with a long history of dispute resolution, placing it further along the experiential road. The choice of focus for the authors was not especially difficult. The US has some basic resemblances of procurement and professional organisation with the UK and both industries operate within common law systems with recognisably similar features. It became apparent from anecdotal sources and the earliest stages of this research that the US had some years previously confronted the difficulties relating to disputes which were perceived to be present in the UK construction industry. Problems of litigation, problems of arbitration, the alleged benefits of Alternative Dispute Resolution (ADR) techniques of various kinds were being discussed by different sectors of the UK construction industry to some extent in a vacuum. For example, positive claims might be advanced by the proponents of ADR as to what its use in the UK would achieve. Thus Karl Mackie of the Centre for Dispute Resolution (CEDR) has claimed that

ADR can offer to the construction industry a whole range of benefits in resolving disputes: "better communications, continued business relationships, active management of the dispute, more options for settlement, speed, reduced costs in achieving settlement, confidentiality, control of the outcome and the process" (Mackie, 1991a, 1991b, 1992).

Negative warnings are sounded by sceptics such as Ronald Davies of the Federation of Associations of Specialists and Sub-contractors (FASS) whose opinion of the present ADR scene is that "it is disturbing to see a predominance of lawyers yet again" and who asks despairingly "what is more likely to ensure the failure of a scheme than that?" (Davies, 1992).

The authors of this paper saw a genuine danger that the debate in the UK will be conducted between proponents of ADR and its opponents as if the use of ADR in construction is unprecedented and therefore open to unlimited speculation and projection. Yet there is a rich literature detailing the US experience of using different methods of dispute resolution in construction. Recent research (Fenn 1991, Newey 1992, Fenn and Singh, 1993) has documented a growth in litigious behaviour within the UK construction industry to a currently high level. In those circumstances, and for other parallel reasons referred to below it seemed appropriate to consider the experience of the US where "Disputes are a fact of life in the construction industry, arising on virtually every project" (McAlpine, 1992).

At the UMIST Conference, Professor Rahim of the University of Western Kentucky, gave his opinion that some of the discussion of the UK position was being conducted at a level which would have obtained in the US up to twenty years previously (Rahim, 1992). The authors of this paper felt that the chances of assessing more accurately the likely degree of success of ADR in meeting perceived conflict resolution needs in construction would be increased if those twenty years could, to some extent at least, be made up. This process could be started by assimilating the lessons of the US construction industry and then undertaking research in the UK industry to identify comparisons, pointing to a likely similar outcome, whether negative or positive) and contrasts, pointing to the likelihood of a different outcome. An appraisal of ADR in construction in the UK which was not so grounded in the existing US work seemed, in simple terms, to run the risk of 'reinventing the wheel'.

Lessons for the UK from the US experience

The starting point for the study was the primary motivation for examining ADR possibilities, namely dissatisfaction with traditional methods. The US business community is widely taken to deplore the court system: "There are few things managers dread more than litigation. Even petty cases have a way of damaging relationships, tarnishing reputations and eating up enormous sums of money, time and talent" (Allison, 1991).

In the US, one of the factors primarily identified as resulting in the development of ADR is an increasing dissatisfaction with litigation. It is therefore germane to consider whether there is a similar phenomenon in the UK and whether there are any lessons to be learnt from that occurrence.

Dissatisfaction with litigation

There are perceived notions in the US that the formal system is unable to resolve disputes quickly and cheaply and that people have become more litigious. Some researchers have "exploded this myth" (Alshuler 1988, Galanter 1983). Alshuler comments that the problem with litigation in the US is an inadequate supply of adjudication rather than the excessive litigiousness of its people.

Markesinis (1990), whilst commenting on the inadequacy of statistical information and the difference in compiling data, contends that the volume of litigation is little different between the US and the UK.¹ The UK construction industry is criticized for its litigious nature and the frequency of dispute (Fenn 1991). Recent research suggests that the Official Referees Court, which has jurisdiction for construction disputes, has an increased rate of litigation and that the court is under resourced for that level of litigation. (Fenn and Singh. 1993) Analogous to the US there is a perception in the UK that the formal system of litigation is too costly, inflicted with delay and divisive with its adversarial system.

The UK and the US are both experiencing a similar disillusionment with the litigation process. A spokesperson for the British Property Federation (BPF), representing the employers in construction, stated that he would never recommend litigation. It is unsatisfactory whether you win or lose. One JCT 63 contract his company had been involved in from 1976 was still being litigated. There were similar views expressed about the general unsatisfactory nature of litigation from the other representative bodies. In the US this dissatisfaction led to the advancement of ADR and in recent years in the UK there has been a marketing and

¹ The total number of civil actions the US, with a population of 239,283,000 was 14,800,000. The UK, with a population of 56,972,700 had 2,982,904. Markesinis contends that the overall volume of litigation is little different but that the real difference is in the volume of the tort cases. In the US this figure was 911,000 (in 1984) in comparison to 60,030 for the UK.

promotion of ADR in which the construction industry has been heavily targeted (Fenn 1991).

Dissatisfaction with arbitration

Arbitration is often described as one of the processes used by the US construction industry (Sweet 1993). There is debate as to whether it is an alternative dispute process in the UK (Lavers, 1992, Street, 1992, see below). The UK construction industry has had experience of this process since the last century. There is growing dissatisfaction with some forms of arbitration, in both countries (Stipanowich, 1988). It is now perceived to be as formal, legalized and costly as litigation. Despite this, construction is one of the bigger sectors of UK industry to use arbitration. It is estimated that about 30-35% of all arbitrations are connected with the construction industry (Hoare et al, 1992).

Criticism of arbitration has proliferated for the last several years in the UK construction literature and other professional journals.² This is substantiated by interviews with representatives of bodies concerned with the industry. Lawyers are criticized for "hi-jacking"³ the arbitration process and making the process a "mimic"⁴ of litigation, with confusing procedures which result in the dependence on professional lawyers.

The procedure has been seen to have been "judicialized" in both the US and the UK (Sweet, 1993, Flood and Caiger, 1993). The growth of lawyer involvement in UK construction arbitration has been linked to the development of standard form contracts in the construction industry. Flood and Caiger submit that lawyers involved in construction arbitration have sought to "juridify" the process in order to protect their position and authority from the non-lawyer: the architects, surveyors and engineers who are also involved with the arbitration process as arbitrators. They conclude that lawyers are in a singular position: "...because of their power over the discourse of legalism. They have the power of appropriation."

The criticism of arbitration is such, that it has even been described as being indistinguishable from litigation, except that in arbitration you have to pay not only for the hire of the courtroom but for the judge, which is not the case in litigation (Fletcher 1990). In interviews, with representatives of

² Some examples:
Bingham (1992)
Royce (1989)
Morris (1991)
Miller (1992)

³ Bingham (1992).

⁴ O'Connor (1992).

the diverse institutions involved in the construction industry, there were frequent assertions that the cost and time elements in arbitration made it as unattractive an option as litigation.⁵

Manipulation of formal systems

The implication was also made in the interviews undertaken that the formal procedures of litigation and arbitration are used as levers for negotiation. Due to the expense and time involved in both processes, the threat of either can be tactically exploited. A survey and interviews, to elicit consumer reaction to arbitration in construction, reported that there was widespread use of "gamesmanship" to influence other parties in the dispute (Hoare et al 1992). It was also observed that there was an "incredible lack of trust" between the parties to construction disputes. It surmises that arbitration is not fulfilling its original objective of a quick, cheap and fair alternative to litigation but that many of the factors causing this were in the "hearts and minds" of the parties involved.

A spokesperson for FASS (Federation of Associations of Specialists & Sub-contractors) indicated the growing concerns of the specialist and other sub-contractors, who are especially vexed with the manipulation of arbitration by the main contractors and their lawyers. It was claimed that the main contractors could, with the aid of their lawyer, "fob off" the appointment of the arbitrator for 3-6 months and this, together with the complexity of the arbitration procedure, can result in the hold up of cash flow within the industry for up to 18 months to 2 years. Further, the contention was that the specialist sub-contractors, who are primarily concerned with survival in the present economic climate, are forced to settle the dispute for 40 or 60% less.

Some lawyers are themselves critical of arbitration. One large law firm involved in construction disputes felt that the system of appointing arbitrators was unsophisticated. The arbitrator often does not have a proper view of the merits of a case and therefore they are perceived as splitting the decision 50/50 or 60/40. They believe that once many parties have experienced arbitration there is little incentive to try the process again. A further implication, extracted from the interviews, was that the arbitrators were frightened of appeals for misconduct and therefore were not prepared to stray from following a procedure imitating litigation with its adversarial and procedural bound approach.

Promotion of ADR

It is this perspective of the shortcomings of arbitration and litigation which has engendered an increasing awareness of ADR and the potential it may have for the dispute resolution needs of the UK construction industry. However, the reports of the manipulation of arbitration and litigation must raise the consideration that this distrust may eventually spread to ADR and prevent it reaching its full potential role

⁵ Bingham (1992). The costs of a 5 day arbitration and a 5 day court hearing were compared. Arbitration, it was estimated, cost £47,000 and litigation £44,000

in resolving construction disputes. Frequent comments were made in interviews that ADR would be manipulated by the lawyers and that this would be one of the major factors influencing its development. This perception is to be further investigated.

A further contention is that ADR may follow the same route as arbitration. By charting the history of the development of arbitration into legalism and formalism an analogy may be drawn with the eventual development of ADR. It could become as formalized and legalized as arbitration (Brooker, 1993). Legal involvement grew in arbitration when the process was formally recognized in law and when arbitration needed the formal system of litigation to enforce its awards and its authority. The proponents of ADR urge the incorporation of ADR clauses in order to promote its use. This will lead to litigation to test their validity, which is a path that arbitration followed in its development. Some concern was articulated in the interviews that the use of forced procedures, either through contract clauses or mandatory court requirement, will stifle the consensual and experimental spirit of ADR.

US Perceptions and Experience of ADR

There is evidence that there are parallels in the UK and US construction industry about the perceptions and experience of litigation and arbitration. The US now has considerable experience with ADR. This research was commenced in order to assess how the US experience could be utilized in order to assess the potential contribution of ADR to the dispute resolution needs of the UK construction industry.

Research undertaken by Stipanowich and Henderson (1992) investigated the role of mediation and mini-trials in construction disputes. Negative perception about ADR had been identified in the US construction literature. For example; when a party suggested using ADR that it showed a lack of confidence in the case; that using ADR results in a detriment as it reveals trial strategy; and there was also a perception that ADR was used as a "pressure to settle" tactic. The hypothesis was that there was a lack of empirical data about the new processes, which may have resulted in a misapplication of procedures or incorrect choice of process. The aim of the American Bar Association (ABA) survey was to test the negative attitudes and accordingly supplant anecdote and hearsay with actual hard data on the attitudes and experience of US lawyers involved in ADR in the construction industry.

Negative perceptions in the US

The ABA survey indicated that the views of mediation and mini-trials depicted in the literature did not tally with the experiences of construction lawyers. Interestingly 86% of survey respondents disagreed that proposing mediation would be a sign of weakness and almost 90% did not believe proposing a mini-trial indicated a weakness. Similarly the results disclosed that the survey group were relatively unconcerned with the revelation of trial strategy or confidential information when using mediation or mini-trials. Only 5% of the respondents believed that ADR caused problems with delay and disruption of litigation or

arbitration. The "pressure to reach agreement" hypothesis also received little support from the survey response. ADR success did not appear to depend on the initiation of arbitration or litigation.

UK Perceptions of ADR

The research premise was that the same negative perceptions were being constructed in the UK construction industry. If these attitudes are at play then it may be that we can learn from the US experience and that the hard data produced from the ABA survey may help to direct the development of ADR in the UK.

The methodology employed was a literature search to elicit the prevailing perceptions of ADR and the attitudes towards the formal system. This was then followed by semi-structured interviews with representatives of the major professions and bodies, which make up the construction industry, to produce qualitative material of the build up of perceptions towards ADR. The information produced is now being tested through a quantitative survey.

Literature search

Initially an investigation was undertaken to examine whether these negative perceptions were being replicated in the construction literature. The search disclosed that both positive and negative attitudes were being created. Many of the positive perceptions were in the form of promotional material from interested organizations and individual proponents who had undergone the present available mediator training. The perceived advantages of ADR have been well documented by many authors in the UK,⁶ however the focus of the research was to detect the negative attitudes and to explore how these may affect the development of ADR.

The most frequently presented negative perceptions of ADR in the literature were;

- Proposing ADR is a sign of weakness;
- ADR reveals the company's position to the opposition;
- ADR before discovery could result in settlement without knowing the true facts;
- ADR agreements may not be enforceable;
- ADR is a form of "pressure to settle" and leads to compromise;
- ADR can be used to delay payment;
- ADR is not appropriate to the UK as the culture is different from the US.

⁶ Some examples:

Mackie (1992), Royce (1989), Watson (1992), Hollands (1992), Bingham (1990), Collins (1992), Dixon and Carrol (1990).

As yet there is a relatively moderate amount of literature on ADR with which to suggest that these were generally held perceptions in the construction industry, though the search evidenced a growing awareness and interest. Some of the negative views were raised by the proponents of ADR, who then advanced counter arguments to promote its development. For example: ADR is a sign of weakness. If an ADR clause is incorporated in the contract then this would prevent this perception.

Semi-structured Interviews

In order to confirm whether these perceptions were more generally held in construction, a series of interviews were conducted with individuals identified as a spokesperson for the professional institutions and representative bodies. The agenda for the indicator exercise was two-fold; First, to identify one or more possible axes of dispute within the construction industry; and second, to provide insight into the perceptions of ADR held in construction.

Perceptions of the Major Causes of Dispute

One major factor identified as causing dispute was the competitive tendering that the industry is experiencing. The knock on effect is that contractors, who cannot complete for the price tendered, are putting pressure on the specialist sub-contractor and sub-contractors, and exploiting them for extended credit. This has left the industry in a volatile situation. Dispute is rife. However many claims are never pursued due to businesses going bust or settling in order to survive. The RICS (Royal Institution of Chartered Surveyors) have a Quantity Surveyor's scale of fees for pricing. They contended that some bids were 60% below the recommended scale.

Added to this problem is the mistrust of many the parties involved in construction towards each other. Diverse sectors of the industry were found culpable for dispute problems. The sub-contractors were blamed for not having the necessary expertise. The main contractors were accused of holding the sub-contractors to ransom. The consultants were criticized for not adequately specifying their designs and failing to clarify their brief. One other major catalyst for generating dispute was delay, which was caused by a multiplicity of factors but primarily for extensions of time.⁷

⁷ Construction Industry Council Report (1994) on Dispute Resolution identifies the major causes of dispute.

The forthcoming Latham Report, on procurement and contractual arrangements in the UK Construction Industry, may address some of these concerns. The interim report⁸, identified "trust and money" as the most important issues in the consultative discussions. Each sector of the industry was distrustful of the other; the clients, who felt the need to hire consultants to defend their interest; The professional consultants, who are concerned that the client is trying to remove him from his traditional adjudicator role; contractors, who fear they will not be paid, or that the monthly certified payment will not reflect the work done or that the specialist sub-contractor will overcharge and they will not make a profit on their streamlined tender price; and the "specialist sub-contractors fear that they will be underpaid or paid late or subject to unreasonable discounts or set offs. There is "Too little trust -and not enough money."

The interviewees for this research also theorised that the present financial climate contributed to dispute, as its effect was to make the parties keep to the strict letter of the contract, whereas in the past variations would be absorbed, if at all possible. History has shown that when there is an economic boom the commercial world feels the law is too rigid and failing to respond to its needs and this results in experimentation with alternatives (Ferguson 1980, Arthurs 1984). However, when it is in decline then people are more likely to stand on their legal rights as they have more to lose (Ellenbogen, 1952).

A similar theory has been proposed about the success of ADR within the construction at this present time. A leading law firm has asserted that its clients were opting to litigate in order to gain time and would be uninterested in employing speedier methods of resolution (Yuille, 1993).

Finance may be a driving factor in the likely success of new processes. The construction industry in the UK is in a depression. Flood and Caiger (1993) describe the decline of the top ten construction companies' profits since the late 1980's. They report that some companies were forecasting zero profits for 1992. Despite the ADR supporters' conviction that the time has arrived for the new processes (Times, 1994). It may transpire that the economic climate will prevent the development of ADR.

Negative Perceptions

The interviews did not generally demonstrate that the negative perceptions of ADR were extensively at play. Of the three attitudes canvassed in the ABA survey; ADR is a sign of weakness; it reveals trial strategy; and it is used to pressurize settlement, only the final one was referred to in any depth and the most consistent concern seemed to be with the use of ADR to create delay in dispute resolution. The first two attitudes above were only remarked on by the legal advisors who were reluctant to recommend ADR if they saw the other side using it tactically. It was also claimed that most "sophisticated clients" raised the issue of ADR but always finally

⁸ Latham (1993).

decided not to use it. They were specifically cautious about advising on ADR when the full facts of the dispute were unknown.

More cynically, the implication was made that ADR claims to produce results which are a commercial reality, "finding the acceptable deal", which does not take account of the abstract concepts of the rights and wrongs of the dispute. The ADR neutral, it was implied, does not take on the responsibility of the trained arbitrator, that of deciding the issue on notions of justice. This commercial reality could, it was submitted, be equated to power structures, the more powerful using ADR to achieve the desired result. These arguments about ADR are not new (Abel 1982, Auerbach 1983, Fiss 1984, Roberts 1993).

Perceptions of Delay

A more prevalent perception was the implication that ADR could be used to manipulate the dispute. Both lawyers and the insurance industry were identified as being more concerned with delaying dispute for their own interests. It was submitted that insurers were interested in any means to save on legal costs, which it was estimated were two-thirds of the costs of any dispute. However they were, it was stated, reactive rather than proactive and would follow the demands of their clients. Various sources suggested that delay in dispute meant investment for the insurance industry and therefore they may be indifferent to a speedy resolution of construction disputes.

Lawyers likewise, it was implied, had a vested interest in not settling disputes. There was considerable scepticism about the role of lawyers in ADR. Several representatives expressed concern that lawyers would be instrumental in its development. It was observed that legal advisors would attempt to monopolize ADR, a belief commented on in the literature (Roberts 1993, Robertshaw and Segal, 1993). However, lawyers were not acknowledged as the ideal choice of mediator, as they were perceived as being unskilful in pragmatic solutions and were trained in an adversarial role. Significantly it was intimated that they could hinder the progress of ADR.

There was evidence to suggest that lawyers were aware of their poor image, which was created in the 1980's with increasing legal costs, and that they were now marketing ADR as a method of improving their profile. Yet the perception of many interviewed was that the legal profession may not have a committed interest in the advancement of ADR. This perception is to be further investigated. (See below.)

The interviews also disclosed apprehension about ADR being used to delay the resolution of the dispute. There was concern that mandatory ADR, through contract provision, would create delay in the final decisions which would then be made through arbitration or litigation. If the issue to be resolved was only a "yes" or "no" decision, then to force ADR on respondents by contract provision would only result in unnecessary delay. Similarly, it was observed that if no agreement or settlement was reached through an ADR procedure, it would only cause further delay in the resolution of that dispute. Delay has already been classified as a major problem in construction.

US empirical data

If the negative perceptions about ADR in the US were found generally to have little bearing on the actual experience of construction lawyers and the early interviews in the UK do not suggest that there are extensive, negative attitudes, then what lesson can be learnt from the practice of ADR in US construction disputes?

There are two areas of particular interest from the ABA survey which may be of practical advantage to the development of ADR in the UK; the impetus for using ADR; and the settlement rate of ADR.

The ABA survey identified the impetus for using ADR: Two-thirds of the time it was as the product of agreement between the parties; about a third was court initiated; and the least often was by contract provision. The literature in the UK implies that the way to prevent the perception of using ADR as a weakness is to make provision for it in the contract. The US experience is that the use of ADR is not perceived as a weakness and it is used more often because of agreement rather than because of court or contract demands.

Further, when the figures for settlement were examined by the ABA survey, 43% of cases failed to reach full agreement when the parties were required to use ADR, either through contract provision or court demands, in comparison to 27.8% where the parties had agreed to use ADR. The literature, the interviews and the reports indicate that there will be increasing provision in contracts for ADR. It may be that it is counter productive to make ADR mandatory and that this would frustrate its potential development.

Several of the professional bodies are investigating the use of ADR clauses in standardized contracts. Indeed the ICE 6th Edition has provision for conciliation. The clause has not gone without criticism⁹ and there are suggestions that some organizations, which use the contract, are opting to leave it out.

The future of ADR in UK construction?

ADR has arrived, some say imported from the US. Most of the professional bodies in both construction and the legal profession have set up working parties to report on conflict and conflict resolution. The Construction Industry Council (CIC) set up a task force, whose terms of reference were to identify the disputes which arise in all parts of construction and the existing methods of resolution. The published report in January 1994 identified a table of the known ADR services and panels of ADR trained neutrals available as of 1 July 1993.

⁹ Eggleston (1993) and interviews.

The CIC report concludes that ADR in the UK has already developed as a substitute for arbitration and litigation. They recommend that there is a need for co-ordination between the various schemes. They suggested publishing model rules of procedure but cautioned that there is a danger that those procedures should become too legalised. The assimilation of arbitration with litigation should be considered when these procedures are developed.

Despite the long list of available ADR services it is difficult to assess the actual incidence of the use of ADR. A conflicting picture was drawn from the interviews. Several trained mediators/conciliators who were on the professional institutions' panels stated that they had never had an official reference.

The RICS commented that in response to a questionnaire of parties interested in ADR they had 200-250 replies and that 70 chartered surveyors have chosen to advertise ADR in their directory, a sign of involvement and interest in the new procedures. The RICS has also set up a panel of mediators though they could not claim that they had made any appointments.

It was reported that CEDR, (Centre for Dispute Resolution) which was set up in 1990, have had 250 disputes, worth more than £800 million referred to it since its inception. Of these 25% completed formal ADR processes. It was estimated that this saved more than £30 million in legal costs (Financial Times 1993). Dr Karl Mackie, the Director, is quoted as attributing the lack of impact of ADR to the adversarial culture and mindset of both lawyers and clients.

The contention made in the interviews was that for ADR to develop, the construction industry must be educated about the new procedures and the potential role they may play. In particular it was suggested that this must happen at undergraduate level. The same should apply to the teaching of the law degree in the UK universities.

Adjudication

One ADR process which, it has emerged, has considerable support, was adjudication (Latham, 1993 and interviews). There was an identified need for a quick binding decision to be made in construction conflict so that the work could continue. Adjudication appears to be the favoured choice amongst many construction representatives.

Most of the interviewees felt that there was a need to return to the original objectives of arbitration, the provision of a quick, cheap and fair result and adjudication was perceived as one way to achieve this. Some sectors of the industry wished to see an extension of the application of this procedure and more provision for it in standard form contracts. There were some bodies not so enamoured with the procedure, most notably architects, who feel their traditional role as adjudicator is being eroded. (Latham 1993, and interviews.)

The BPF use adjudication in their standard form contract, which minimizes the contractor's ability to get out of responsibility for design by ensuring that when

they tender for a job they take on the risk for design as well. The clients are apparently satisfied with the contract.¹⁰

Adjudication is perhaps one of the ADR procedures most similar to arbitration. If the criticisms of arbitration are that it has become procedurally bound and that the arbitrators are committed to an adversarial approach, care needs to be taken in the development of adjudication. The proposal of many representatives of the construction industry is that adjudication should be more extensively used in the standard form contracts. If it evolves in the same way as arbitration, it may also be assimilated by the formal system.

Further research

A quantitative survey to elicit further the perceptions of ADR and to provide hard data on how it is employed in the construction industry is currently taking place. The survey will investigate not only the perceptions and experience of the legal advisors to construction, as was the aim of the ABA survey, but also the perceptions of other personnel and professionals involved in construction disputes. The interviews have indicated one of the more sensitive axes of dispute where it was felt that ADR may have the most potential to develop and the sample for the survey has been selected from that axis.

Conclusions

The starting point of the research project, the beginning of which is described in this paper, was the UMIST conference and two lessons which it re-emphasised usefully for those in the UK concerned with construction conflict and its resolution.

The first lesson was that different nations have different approaches to construction (and other) disputes and that these may change in time, often following the recognisable path taken previously elsewhere. An example arising from the UMIST papers was of South East Asian cultures, moving from traditional conflict avoidance towards Western style familiarity with formal disputes and a growing 'claims industry'. The second lesson was that benefit may be obtained in considering the appropriateness of the conflict resolution systems within a construction industry, by examining the experience of comparable industries in other countries. An example placed before the UMIST conference was Hong Kong's Dispute Resolution Adviser, based upon the US Army Corps of Engineers' Disputes Review Boards.

Accordingly, the decision was taken to examine the US experience of construction dispute resolution which would be capable of informing a study of the UK position and of assisting projections as to the likely future of comparable mechanisms in the UK construction industry.

¹⁰ The Managing Director of St Martins, who was a spokesperson for the BPF, reported that they have used this contract on 25 occasions (approx) and have only had 2 disputes which have gone to adjudication. He expressed satisfaction with the procedure, despite coming out the loser on one decision.

The perception in the UK of increasing volumes of construction disputes and litigation is supported by research findings (Fenn, 1991, Newey, 1992, Fenn and Singh 1993). The US industry can be characterised as litigious. Even accepting that the more exaggerated claims of 'Hyperlexis' (Manning, 1977), the 'Legal Explosion' (Barton, 1975) and 'The Litigious Society' (Lieberman, 1981) have been successfully rebutted by later studies (Sarat 1985, Galanter 1986), the US and its construction industry are still notable for high levels of dispute. It has been observed that "The construction industry suffers from chronic dispute problems" (Marcus and Marcus, 1987). Certainly, dissatisfaction with the litigation process is well-documented: a leading US trial lawyer has called it "beyond doubt that our rising docket volume, serviced by an insufficiently expanded judiciary, is simply unacceptable" (Lyle, 1989) and it has been remarked that "businessmen and observers perceive that the courts are overcrowded, the cases are more and more complex, and the costs, both in monetary and organizational terms, have become excessive" (Gaede, 1991).

The research also encountered dissatisfaction with arbitration. In the UK, arbitration, though self-evidently an alternative to litigation, is not normally classified as a form of ADR (Lavers, 1992) being regarded as a traditional and somewhat formalised system. It has not escaped criticism from within the UK industry (Royce 1989, Bingham 1992). This equivocal view of arbitration, is to some extent shared by US commentators. The authors of a survey on arbitration user satisfaction conducted in Georgia, Alabama and Tennessee reflected this: "Some hail arbitration as a welcome alternative to litigation. Others see arbitration as little more than a less-structured form of litigation" (Riggs and Schenk, 1990). Reference may also be made to the study of the use of arbitration by state agencies in Florida and California (Hester, Kuprenas and Thomas, 1987). The authoritative ABA Construction Arbitration Survey was equally qualified in its approval of the record of arbitration: "While the ABA survey on construction arbitration makes clear that construction lawyers generally prefer arbitration to litigation before a judge or jury, it also demonstrates that in many cases arbitration does not provide efficient, economical and expert justice" (Stipanowich, 1988b).

It has been because of this background of dissatisfaction with litigation and arbitration that the US construction industry has utilised other forms of dispute resolution and it is for this reason that the UK construction industry, or parts of it, have gone some way towards doing the same. One of the possible theories which the authors are seeking to test is that ADR in the UK could suffer from the formalisation which has been at the root of dissatisfaction with litigation and arbitration (Brooker, 1993). As a basis for testing this theory it was seen as desirable to consider perceptions and experience of ADR in the US construction industry.

There are interesting parallels between negative perceptions encountered in the US construction industry and arguments which have been advanced by those sceptical of the benefits of ADR in the UK. It is not difficult to find opponents of ADR setting out their arguments in the US literature and the authors of this paper conclude that negative perceptions have been given an effective airing. Unsurprisingly, the judiciary and the legal profession have contained some of the

sceptics. A former president of the American Bar Association has condemned ADR as a form of private judging, resort to which may damage universally available justice: "The potential dangers of providing one system of justice for the affluent, and another for everyone else, should stimulate us to improve our system of public justice" (Raven, 1988), while other leading voices from the US legal establishment have gone so far as to say that "ADR is a clear and present danger for the individual and for smaller businesses" (Guill and Slavin, 1989). The US construction industry's doubts may be regarded as less philanthropic and based on sceptical pragmatism rather than high principle. The ABA Construction Arbitration Survey tackled the principal reservations head on, albeit through survey of the construction bar rather than of construction personnel per se. Negative perceptions based on a lack of confidence in mediation and mini-trial largely dissolved in the face of hard evidence; neither excessive revelation of the participant's case nor undue pressure to reach agreement was substantiated. (Stipanowich 1988a, 1988b, Stipanowich and Henderson 1992).

The research conducted, in the UK is still ongoing but this paper contains a position report, on the literature survey and 'indicator exercise' conducted thus far. Negative perceptions encountered did not exactly mirror those examined in the ABA survey. However, the use of ADR to pressurise settlement was identified as a common concern between US and UK industries. In addition, ADR was seen to be an opportunity for delay. The role of lawyers in 'colonising' ADR was found to be the subject of concern amongst construction personnel (Davies, 1992, Roberts, 1993).

The US empirical data on the experience of ADR have been identified by the authors as of considerable value in appraising the validity of the opposition to its use in the UK and the likelihood of its successful expansion. The ABA survey is most valuable in this respect in that it provides actual data on settlement rates for a variety of situations involving both mediation and mini-trial (Stipanowich and Henderson, 1992).

Above, all the empirical data in the American literature include documented cases of ADR techniques being used successfully in a wide range of construction disputes (Felsen, 1989, Izbiky and Savage 1989, Gaede 1991), which are likely to be of considerable interest in assessing the potential contribution of ADR in the UK, where such literature is at a much earlier stage (Reina, 1992 Slater, 1994).

The research reported in this paper delineates a number of future tasks to be undertaken. Data are still limited on the incidence of the use of ADR, despite preliminary surveys by the RICS and CEDR. The indicator exercise in particular revealed considerable support specifically for adjudication, which is included in a number of standard form contracts and favoured by the property owners' organisation, the BPF. Ongoing research is intended to provide hard data on the perceptions which ADR is encountering to assist in projecting its likely success in the UK construction industry.

The importance of continuing this research has been recently underlined by the influential Interim Report of the Joint Government Industry Review of

Procurement and Contractual Arrangements in the United Kingdom Construction Industry which reported "general dissatisfaction with arbitration as a method of dispute resolution. It is seen as expensive, slow and nearly always left until after the contract has been completed ... There is also growing interest in Alternative Dispute Resolution rather than arbitration or litigation". (Latham, 1993). It is an interest which, in the view of the authors of this paper, should be placed in the context of existing experience, including crucially that of the United States.

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